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# Transportation Labor Law and Policy for a Deregulated Industry (with Dennis Alan Arouca)

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# Transportation Labor Law and Policy for a Deregulated Industry\*

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## I. Introduction

The loosening of regulatory bonds on railroads, motor carriers and airlines has set off market-induced changes in the structure of those industries. A small number of large carriers now dominate the rail industry, and independent short lines are growing to operate lines that these major carriers have abandoned.<sup>1</sup> Historic rail traffic patterns and employment are being changed by new price and service competition.<sup>2</sup> In trucking, the growth of private carriage, relaxed barriers to entry and proliferation of nonunion firms are threatening the competitive position of unionized trucking companies.<sup>3</sup> In the airline industry, increased competition, both on price and from new entrants, is acting as a destabilizing influence on industry practices which had evolved in a tightly controlled regulatory environment.<sup>4</sup> The growth of intermodal competition and movement of freight is affecting all three industries. With bigger

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1. T. KEELER, RAILROADS, FREIGHT AND PUBLIC POLICY (1983); R. McCAFFREY et al., STARTING A SHORT LINE (1983); Barrons, April 19, 1982; Shaffer, *New Frontier for Shortlines*, MODERN RAILROADS (April 1978). Lieb, *Regulatory Reform in Transportation: Some Interim Observations*, 49 ICC PRAC. J. 273 (1982).

2. See, e.g., Family Lines System—Unilateral Cancellation of Joint Rates, ICC Dkt. No. 38733 (S.B., No. 70569), served December 17, 1981; Changes in Routing Provision—Conrail—July 1981, ICC Dkt. No. 38676, served March 22, 1982. See also Keeler, *supra* note 1.

3. *Trucking Deregulation—A Symposium*, 32 U. FLA. L. REV. 843-933 (1980); Harper, *The Federal Motor Carrier Act of 1980: Review & Analysis*, 20 TRANSP. J. 5 (1981); Levinson, *Trucking*, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE, 99, 135, 147 (G. Sommers ed. 1980).

4. Kahn, *Airlines*, COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE, 315, 320, 337-38 (G. Sommers ed. 1980); Jansonius & Broughton, *Coping with Deregulation: Reduction of Labor Costs in the Airline Industry*, 49 J. AIR L. & COM. 501 (1984). *Deregulation Impact on Labor Management Relations*, 102 LAB. REL. REP. (BNA) 15-17 (1979); Ellison, *The Structural Change of the Airline Industry Following Deregulation*, 21 TRANSP. J. 58 (1982).

trucks, better highways, increased popularity of air express, and technological development, it is not uncommon for some freight to move in containers via some combination of air, water, railroad, and motor carrier from origin to destination.<sup>5</sup>

This new, increasingly competitive environment is challenging the way in which transportation labor and management interact at the bargaining table and under the law. An examination of the basic legal framework for collective bargaining in the transportation industry is both timely and appropriate for the current transitional period. Two statutes,<sup>6</sup> embodying two different philosophies on the role of law in the work place, apply to transportation. One of the two statutory approaches or perhaps a consolidation, may be better for a deregulated environment.

The first part of this article reviews the different conceptual origin of each statute and, using British labor law as a paradigm, describes the philosophy inherent in each. It then describes how interpretations of the two statutes have tended to blur philosophical distinctions and have caused them to converge over time. The article goes on to consider two major contemporary issues affecting collective bargaining under the Railway Labor Act (RLA)<sup>7</sup> and the National Labor Relations Act (NLRA):<sup>8</sup> (1) the control of the timing of economic action, and (2) the determination of bargaining units. The focus is on what changes in legal structure, if any, are appropriate for today's transportation industry. The third part of the article then considers the general issue of a consolidated transportation labor law, using as a background the changing regulation for, and growth of, intermodalism. The article concludes with a discussion of whether, after fifty years under the RLA and NLRA, and with a changing transportation marketplace, the time is right to choose a fresh direction for future transportation labor law and policy—how much and what type of regulation is appropriate? We offer some suggestions for policy makers to consider, each of which is anchored to the same touchstone—less government intervention may be more conducive to development of collective bargaining in an increasingly competitive and integrated transportation industry.

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5. See generally *Symposium—Intermodal Transportation*, 12 TRANSP. L. J. 75-137 (1981). See also *American Trucking Assoc. v. ICC*, 656 F.2d 1115 (5th Cir. 1981) (refusal to reverse ICC exemption from regulation (364 ICC 391 (1980)) of trailer and container-on-flatcar movements by rail).

6. The National Labor Relations Act, 29 U.S.C. § 141 (1982), covers trucking. The Railway Labor Act, 45 U.S.C. § 151 (1982), covers railroads and airlines.

7. 45 U.S.C. § 151-188 (1982).

8. 29 U.S.C. § 141 (1982).

## II. Conceptual Origins of the RLA and the NLRA

The two statutes regulating collective bargaining in private sector transportation, the RLA for railroads and airlines, the NLRA for trucking, share the same underlying purpose—the prevention of industrial unrest.<sup>9</sup> The two statutes have different origins and philosophies, however, although judicial enforcement over the years has blurred the differences.

### A. Introduction

The primary difference between the two American statutes is the envisioned degree of government intervention into private employment relations. A low level of government intervention can be characterized as “abstentionist,” while a high degree of intervention can be characterized as “interventionist.” The RLA is paradoxically more interventionist than the NLRA with respect to dispute resolution and more abstentionist than the NLRA in all other respects.

The most obvious difference is the degree to which the machinery of the two Acts imposes the use of dispute settlement procedures as alternatives to strikes over labor disputes. Like its predecessors,<sup>10</sup> the RLA<sup>11</sup> favors such procedures. Grievances (referred to as “minor disputes” in RLA parlance and “rights disputes” in general industrial relations parlance) must be adjusted by voluntarily established boards or by an administrative agency—the National Railroad Adjustment Board.<sup>12</sup> The Act provides for the National Mediation Board to mediate both interest disputes (referred to as “major disputes” in RLA parlance) and certain nonadjusted minor disputes. The Board also may induce the parties to submit disputes not resolved by mediation to arbitration.<sup>13</sup> Finally, the Act provides that disputes not resolved by these processes may be subjected to fact-finding and recommended settlement by an emergency board created by the President.<sup>14</sup> Compliance with the dispute settlement procedures of the RLA is enforceable in the courts, as an accommodation of the Norris LaGuardia Act,<sup>15</sup> which usually bars federal labor injunctions.

In contrast, the NLRA, as originally enacted,<sup>16</sup> was almost exclusively concerned with the quasi-judicial functions of selecting bargain-

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9. Compare Section 2 of the Railway Labor Act, 45 U.S.C. § 152, with Section 1 of the National Labor Relations Act, 29 U.S.C. § 151.

10. See generally L. LECHT, *EXPERIENCE UNDER RAILWAY LABOR LEGISLATION* (1955), and note 48 *infra*.

11. Ch. 347, 44 Stat. 547 (1926), amended by Ch. 691, 48 Stat. 1185 (1934).

12. Railway Labor Act, § 3, 45 U.S.C. § 153.

13. Railway Labor Act §§ 4, 5, 45 U.S.C. §§ 154, 155.

14. Railway Labor Act § 10, 45 U.S.C. § 160 (1982).

15. *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 581–84 (1971).

16. See Ch. 372, 49 Stat. 449 (1935).

ing representatives and establishing the bargaining relationship. The 1947, amendments, did include limited dispute resolution features.<sup>17</sup> The amended Acts requires sixty days advance notice of a desire by either party to modify or terminate a collective bargaining agreement, and prohibits economic action during such period.<sup>18</sup> The Federal Mediation and Conciliation Service must be notified of the dispute, and may proffer its mediation services to the parties.<sup>19</sup> Still, the NLRA is less interventionist in this regard than the RLA because the parties control the timing of economic action under the NLRA and the government controls the timing under the RLA.

The different dispute-settlement machinery under the two acts influences industrial relations less, however, than other aspects of the two statutes, which embrace fundamentally different conceptual approaches to labor relations. In all matters other than dispute resolution, the RLA is abstentionist, while the NLRA is interventionist. The RLA was intended to be a very loose legal framework within which most controversies would be adjusted voluntarily. The NLRA was intended to be a much tighter and more detailed set of obligations which would be explicated and applied by legal institutions. The RLA abstentionist approach resembles British labor law more than the NLRA's substantial legal intervention, which is well accepted today as the American norm.

### *B. The British Abstentionist Model*

The British abstentionist model is marked by at least two distinct characteristics. First, it seeks to promote stable labor-management relations almost exclusively through the application of economic power. Second, it favors a "dynamic" rather than a "static" method of achieving and administering collective bargaining agreements.<sup>20</sup>

Reliance on economic power rather than law in Britain resulted from the limited franchise during Britain's industrial revolution and from mistrust of courts. Denied access through politics, labor was left to its own means to advance its interests, the use of economic power through industrial organization.<sup>21</sup> Trade unionists perceived the courts to be hostile to their interests. *Taff Vale v. ASRS*<sup>22</sup> showed that this perception was well founded; its extension of tort liability almost destroyed the trade union movement by exposing a union itself, as distinct from its officials, to liability for damages. Although the Trade Disputes Act of

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17. See Ch. 120, 61 Stat. 136 (1947).

18. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d).

19. Labor Management Relations Act § 203, 29 U.S.C. § 173.

20. O. KAHN-FREUND, *LABOUR AND THE LAW*, 245 (strike is central doctrine) 56-61 (dynamic bargaining). See also R. LEWIS & B. SIMPSON, *STRIKING A BALANCE: EMPLOYMENT LAW AFTER THE 1980 ACT*, 7-10 (1981).

21. O. KAHN-FREUND, *supra* note 20, at 43.

22. [1901] A. C. 426 (H.L.).

1906<sup>23</sup> reversed *Taff Vale*, the courts created new forms of tort liability for unions.<sup>24</sup>

The early history of British labor law thus resembled strongly the American experience. Indeed the Trade Disputes Act of 1906 was used by the Congress as a model for the labor provisions of the Clayton Act,<sup>25</sup> which subsequently were strengthened by the Norris-LaGuardia Act.<sup>26</sup> In both countries, the political controversy of this early period centered on reducing judicial intervention in labor disputes in order to protect the free interplay of economic forces. The resulting policy in both countries was abstentionist.

In 1935, however, British and American labor policy diverged sharply.<sup>27</sup> British policy remained abstentionist, while, with the enactment of the NLRA, American policy became interventionist.

The second characteristic of the British approach, the use of a "dynamic" or "institutional" method of reaching agreements, must be contrasted with its opposite, a "static" or "contractual" method. In the static method, the parties come together, negotiate, arrive at an agreement, and then disperse, to renew their negotiations when the agreement expires.<sup>28</sup> The dynamic or institutional method makes use of a permanent bilateral body, on which both sides are equally represented, to make new or modify old decisions at any time, on a continuing basis. The effect is that open-ended rather than fixed agreements are encouraged, and problems tend to be resolved on an "ad hoc" basis, as they arise.<sup>29</sup>

These two characteristics of the British approach, the reliance on economic power and bargaining, have affected the entire process of collective bargaining in that country. The problem of union recognition, for example, was until recently entirely left to the parties to resolve—the law did nothing to make it incumbent on any employer to bargain with a union or any union to bargain with an employer.<sup>30</sup> The effect was two-fold: the success of a union in achieving recognition depended solely on its relative economic power, and "multi-unionism" was permitted and has flourished.<sup>31</sup>

The duty to bargain similarly was affected. Compulsory methods of achieving agreements have always been alien to the law of Britain—the

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23. Trade Disputes Act 1906 § 6 Edw. 7, C. 47.

24. See LEWIS & SIMPSON, *supra* note 20, at 3–7.

25. See Annot., 27 A.L.R. 411 (1923) (labor provisions of Clayton Act modelled on the 1906 British statute); *Great Northern Ry. v. Brosseau*, 286 Fed. 414 (1923) (same).

26. 29 U.S.C. §§101–115 (1982).

27. One reason for the divergence may be that the United States experienced a surge in strike incidence in the early 1930s.

28. O. KAHN-FREUND, *supra* note 20, at 57.

29. *Id.* at 57–58.

30. *Id.* at 79.

31. See *generally id.* at 79–88.

moving force behind the bargaining process, as with union recognition, has been the application of economic power.<sup>32</sup>

Finally, contract enforcement also was affected by abstentionism. Until 1971, collective agreements were not generally enforceable as legally binding contracts.<sup>33</sup> One reason for this is that the law was silent on this issue, i.e., it did not affirmatively require that collective agreements be generally enforceable. Another reason is that the parties generally lacked the intent necessary for contract formation. This lack of intent was the result of the dynamic method of collective bargaining—the parties' agreements were tentative, continually modifiable in whole or in part. The effect of the lack of legal enforceability was that the parties ultimately depended on their economic power to assure the observance of their agreements.<sup>34</sup>

English labor law has been in a considerable state of flux for the last fifteen years, as Conservative and Labor Governments exchange places and enact entire statutory frameworks to their liking. To oversimplify a bit, the thrust of Conservative labor law during this period has been to move English law closer to the American model, while the thrust of the Labour Party has been to leave almost the entire range of industrial relations issues to be determined extra-legally by the exertion of economic pressure. The major Conservative statutes were the Industrial Relations Act of 1971, the Employment Act of 1980, and the Employment Act of 1982. The major Labor Party statutes were the Trade Union and Labour Relations Act of 1974 and the Trade Union and Labour Relations Act (Amendment) of 1976. The 1971 Act established for the first time in Britain a comprehensive statutory regulatory framework for collective bargaining, resembling in many respects the American model. The 1971 Act was a spectacular failure.<sup>35</sup> The 1974 and 1976 Acts repealed almost all of the 1971 Act, while the 1980 and 1982 Acts curtailed trade union power, by modifying common-law rights.

Despite this legislative activity, British labor law remains abstentionist. The Government plays only a small role in regulating collective bargaining. No administrative agencies supervise selection of bargaining representatives or administer anything resembling the American unfair labor practice machinery. Disputes between employers and labor organizations are fought out either through economic pressure or in common-law suits brought in the courts. The courts can enjoin certain conduct or award damages based on common-law rights, but they are greatly circumscribed by statutory "immunities" for trade unions.

The only important exception to British abstentionism is a compre-

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32. *Id.* at 111.

33. *Id.* at 129–39.

34. *Id.* at 132.

35. See LEWIS & SIMPSON, *supra* note 20, at 5.

hensive statutory scheme to protect individual employees against "unfair dismissal." Under this program, virtually any employee who is dismissed has the right to an adjudication by an administrative agency to determine whether his employer had just cause to dismiss him, with reinstatement and damages as remedies.<sup>36</sup> Dismissal for trade union activities is declared to be just cause.

Employers have no legally enforceable obligation to bargain with labor organizations representing their employees or to refrain from actions intended to discourage unionization, except for the unfair dismissal limitation discussed in the preceding paragraph. Employers have an obligation, however, to provide information to trade unions to assist them in bargaining, and to consult with trade unions on health and safety and redundancy (layoff) issues.<sup>37</sup>

Employers have a common-law right to be free of actions intended to interfere with their business. Suits to vindicate this right can be brought against labor organizations and their leaders and can result in injunctions and damages.

Historically, English statutory law has provided labor organizations and their leaders with fairly broad "immunity" against such employer suits. The 1980 and 1982 Acts reduced these immunities and now employers can maintain suits for picketing intended to require an employer to coerce subcontractors with respect to recognition, and for certain forms of secondary picketing.<sup>38</sup> Immunities do continue to exist for labor union activity directly aimed at an employer the union seeks to organize. This is so regardless of whether that employer's employees already are organized by another trade union.

General interference with trade or business, while stating a cause of action at common law, still seems to be within the immunities created

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36. See H. PERRITT, *EMPLOYEE DISMISSAL LAW & PRACTICE* § 9.6 (1984) (description of British unfair dismissal system).

37. It seems clear that these obligations apply only to a trade union that has been recognized by the employer. Section 17, Employment Protection Act 1975, 45 HALSBURY'S STATUTES OF ENGLAND 2389 (1975 continuation volume) (disclosure of information); Section 99(1), Employment Protection Act 1975, 45 HALSBURY'S STATUTES OF ENGLAND 2412 (1975 continuation volume) (redundancies); Section 2(6), Health and Safety at Work Act 1974, 44 HALSBURY'S STATUTES OF ENGLAND 1088 (1974 continuation volume) (health and safety issues).

38. Section 14 of the 1982 Act is of particular interest in this regard. In pertinent part, it provides:

Section 13 of the 1974 Act shall prevent an action being actionable in tort in any case where a person induces, or attempts to induce another [to contravene the prohibitions against forcing recognition or non-recognition on a subcontractor]. Section 13 of the 1974 Act shall prevent an act which interferes with the supply (whether or not under a contract) of goods or services, or can reasonably be expected to have such an effect, being actionable in tort in any case where the act is accomplished by inducing breaches of employment agreements and the supplier of the goods or services in question is not the employer of the strikers, pickets or boycotters and the reason for doing the act is that the supplier does not or is not likely to, recognize, negotiate or consult with the trade union.



by the 1974 and 1976 Acts.<sup>39</sup> In the usual industrial dispute case, "wrongful interference" with the performance of a contract will be found from trade union action intentionally inducing employees not to perform their contracts or employment in a way that the union knows will make more difficult the performance of a contract, for example between a supplier and the target employer.<sup>40</sup> The availability of immunities under the combined effect of the 1974, 1976, 1980, and 1982 Acts is difficult to assess with certainty, however.<sup>41</sup>

During the 1970s, British labor relations earned the reputation as being much more strife ridden than in the United States, and therefore hardly worthy of emulation. One may be tempted to attribute this to inherent shortcomings of the abstentionist approach, but a closer examination reveals two facets of the experience which suggest that abstentionism should not be indicted so readily. First, much of the unrest in Britain results from multi-unionism. Second, much of the unrest was focused on the attempt to impose an American-style interventionist statute.

In our view, the jury is still out on the relative merits of abstentionism versus interventionism, as the American experience with each approach under the two basic statutes, the RLA and NLRA, indicates.

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39. See *Merkur Island Corp. v. Laughton*, [1983] 2 W.L.R. 45, 57, 58 (C.A. 1982) (1980 Act probably did not remove immunity for tort of interference with a trade or business).

40. The existence of a cause of action usually depends on the plaintiff being able to identify a contract, the performance of which was interfered with wrongfully. The basic analytical approach was described by the court of appeal in *Marina Shipping Ltd. v. Laughton*:

One can best approach the problem in three stages. Stage 1: Have the plaintiffs a cause of action at common law? If so, stage 2: Is that cause of action removed by the Act of 1974? (When I refer to the Act of 1974, I mean that Act as amended by the Trade Union and Labour Relations (Amendment) Act of 1976). If so, stage 3: Is that cause of action restored by the Act of 1980? If so, the plaintiffs can sue, as also they can if a negative answer is given at stage 2. Now, one should add to the stage 3 inquiry whether the cause of action is restored by the Act of 1982. [1982] Q.B. 1127, [1982] 2 W.L.R. 569, [1982] 1 All E.R. 481. See also *Merkur Island Corp.*, [1983] 2 W.L.R. at 53.

41. Lord Denning's opinion in *Hadmoor Productions Ltd v. Hamilton*, [1981] 3 W.L.R. 139, 151 (C.A. 1981), demonstrates this ably:

It is to retain the statutory immunity for primary action, but to remove the immunity for secondary action. It means that trade union officials who call out men in a dispute with their employer are not liable for acts directed against the employer (primary action), but they are liable for acts directed against his customers or suppliers or other trader (secondary action). Some species of secondary action are given immunity by subsections (3), (4), and (5), but these are so confusing that I cannot attempt to summarize them. Suffice it to say that the general legislative purpose is to make secondary action unlawful and actionable when it directly interferes with the business of any customer or supplier or other trader—not party to the dispute—who suffers by it. Therefore, a strike of employees, or picketing of facilities intended to force [the target] to recognize a trade union to represent its own employees probably would not be enjoinable. However strikes or picketing . . . to put pressure on contractors, or boycotts or strikes or picketing of suppliers or customers . . . probably would be enjoinable.

## B. Evolution of Two Distinct American Philosophies

The British abstentionist approach is reflected more in the RLA than in the NLRA. The RLA, which to a large extent ratified the parties' practice, employs to a greater degree the two characteristic features of the British abstentionist model: reliance on economic power and use of dynamic method of bargaining. The NLRA represented a major effort by the federal government to impose collective bargaining on industry in general, with heavy reliance on legal institutions. This relationship between the American statutes and the British model is discussed below, with particular attention to phases of the collective bargaining process. Exceptions to the general premise exist, of course; in specific instances both statutes have been construed to be relatively interventionist. However, this is because the two statutes are converging, as the courts apply concepts developed under the NLRA to the RLA.<sup>42</sup>

### 1. DEVELOPMENT OF THE AMERICAN STATUTES

Collective bargaining in the railroad industry has been practiced since the 1880s.<sup>43</sup> Though economic conflict occasionally reached proportions that required government intervention, intervention was the exception rather than the rule and occurred on an ad hoc basis. The minimal intervention before World War I occurred in 1886,<sup>44</sup> with the 1894 Pullman strike,<sup>45</sup> and the 1916 eight-hour dispute.<sup>46</sup> During World War I, the government operated the railroads.<sup>47</sup> Until World War I, federal rail labor legislation concerned itself only with means to promote voluntary dispute settlement. Led by experimentation at the state level, the federal government made available fact finding, mediation, and arbitration machinery.<sup>48</sup> Comprehensive regulation of railroad labor relations was not attempted until World War I.<sup>49</sup> The wartime experience with standard national agreements and requirements that employers recognize employee-chosen bargaining representatives caused a change

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42. See *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 388–89 (1969) (National Labor Relations Act concepts and precedent can be used as a guide in Railway Labor Act litigation).

43. See LECHT, *supra* note 10. See also G. EGGERT, RAILROAD LABOR DISPUTES, 103–05 (1967).

44. See LECHT, *supra* note 10, at 14.

45. *Id.* at 16.

46. *Id.* at 28.

47. *Id.* at 31. The federal government operated the nation's railways from December 1917 until March 1920.

48. Compare the Arbitration Act of 1888, ch. 1063, 25 Stat. 501–504 (1888), the Erdman Act of 1898, ch. 370, 30 Stat. 424–428 (1898), the Newlands Act of 1913, ch. 6, 38 Stat. 103–106 (1913) (current version at 45 U.S.C. §§101–125 (1976)), and Adamson Act of 1916, ch. 436, 39 Stat. 721–722 (1916).

49. See LECHT, *supra* note 10, at 31–46.

in the character of the legislative approach, though substantial room for voluntary action remained.<sup>50</sup>

The general pattern was for management and labor to bargain collectively over grievances, revisions in pay rates, and working rules without any legal framework or government guidance.<sup>51</sup> Such bargaining occurred in an atmosphere where work stoppages were possible, constrained only by the capacity of labor organizations to carry off an effective strike, or the capacity of employers to break a strike by discharging employees and hiring replacements. Occasionally injunctions were issued but they were usually in response to widespread interference with the mails (as in 1886 and 1894)<sup>52</sup> or interference with jurisdiction of an equity receivership<sup>53</sup>—legal bases that resulted in great unpredictability as to whether injunctions would be available or if available, could be enforced.

The legislative history of the 1926 Act reveals that the statute itself was merely a government ratification of a private “treaty.” Railroad labor and management drafted it under the prodding of Presidents Harding and Coolidge, and the platforms of both national parties.<sup>54</sup>

The outstanding feature of the 1926 Act was that it was voluntary—there were very few enforceable provisions.<sup>55</sup> The concept of the drafters had been “not to write a lot of statute law for the courts to enforce . . . we expect that most of the provisions of the bill are to be enforced by the power of persuasion, either exercised by the parties themselves or by the government board of mediation representing the public interest.”<sup>56</sup> The RLA was amended in 1934 to strengthen its rights dispute procedures and to enhance the position of national trade unions at the expense of “company unions.” But the basic philosophy remained and the Congress endorsed the voluntary nature of the basic statutory framework.<sup>57</sup>

50. See the Transportation Act of 1920, ch. 91, 41 Stat. 456–499 (1920) (current version is codified in scattered section of 45, 49 U.S.C.). The Act contained comprehensive provisions to deal with labor disputes and imposed an express duty on labor and management to bargain to avoid interruptions to commerce. *Id.* at §301, 41 Stat. 469.

51. LECHT, *supra* note 10, at 3.

52. *Id.* at 16; see also *In re Debs*, 158 U.S. 564, 599–600 (1894).

53. See, e.g., *Waterhouse v. Comer*, 55 F. 149 (W.D. Ga. 1893); *Ames v. Union Pacific Ry. Co.*, 62 F. 7 (D. Neb. 1894).

54. See SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT, 47–51 (Comm. Print 1974).

55. See *Pennsylvania Federation v. Pennsylvania Railroad Co.*, 267 U.S. 203 (1925); *Pennsylvania Railroad Co. v. Railroad Labor Board*, 261 U.S. 72 (1923).

56. *Chicago & N.W. Ry. Co. v. United Transp. Union*, *supra*, 402 U.S. at 590–91 (Brennan, J., dissenting).

57. The Railway Labor Act amendments of 1934, 48 Stat. 926 (1934), established a National Board of Adjustment to hear grievance disputes, and strengthened the representation provisions of the Act. Much of the congressional debate focused on the absence of agreement between labor and management in contrast to the situation respecting the 1926 Act. See 78 CONG. REC. 11713–11714 (House Debate), 78 CONG. REC. 12370–12372 (Senate Debate).

The political evolution of the NLRA was substantially different. By the beginning of the New Deal the decline of collective bargaining and the fortunes of organized labor showed that voluntarism, the watchword of the leadership of the American Federation of Labor, was not working well.<sup>58</sup> Labor thus was induced to resort to legislation rather than to economic action to protect its future.<sup>59</sup>

Promotion of collective bargaining for the economy generally was an objective of the National Industrial Recovery Act of 1933.<sup>60</sup> However the NIRA machinery proved unequal to the task, in the face of employer defiance and policy conflicts within the Roosevelt Administration.<sup>61</sup> The drafting of what became the NLRA thus focused on enforcement.<sup>62</sup> Tripartism, and a combination of quasi-judicial functions with mediation, conciliation, arbitration and other adjustment processes, were rejected.<sup>63</sup> Superimposed on these considerations was a preoccupation with constitutional issues during a time when the Supreme Court declared the NIRA to be unconstitutional.<sup>64</sup> This preoccupation led the drafters to concentrate on traditional legal processes to implement policy,<sup>65</sup> reinforcing the separation of adjudication from informal adjustment approaches.

Thus the NLRA was born as more interventionist than the RLA. In some respects the perceived problems addressed by the two statutes were the same, but the solutions were different in subtle, but important ways. Much of the difference is explained by the greater degree of employer hostility to collective bargaining in industry generally, as compared with greater employer acquiescence in the railroad industry, and the difference between the political and legal environment in 1935, as opposed to 1926.

## 2. ADMINISTRATIVE MACHINERY

The most important way in which the two statutes differ relates to the machinery for their interpretation. The machinery employed by the RLA is more abstentionist than that employed by the NLRA.<sup>66</sup>

The NLRA established an administrative agency, the National La-

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58. See I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY*, 23 (1970) (quoting Samuel Gompers, President of the A.F.L.) (hereinafter BERNSTEIN). For more on voluntarism, see C. REHMUS, D. McLAUGHLIN, AND F. NESBITT, eds. *LABOR AND AMERICAN POLITICS*, 83-129 (1978).

59. *Id.*

60. 48 Stat. 195 (1933).

61. See BERNSTEIN at 59-60.

62. See generally *id.* at 88-99.

63. *Id.*

64. *Id.*, discussing *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

65. *Id.*

66. This machinery should be distinguished from the Acts' machinery for imposing dispute settlement procedures, which have just the opposite relationship. Interpretation machinery, unlike the ad-hoc dispute settlement machinery, lays down a complex body of precedent that effectively constrains voluntary action.

bor Relations Board (NLRB), which has almost plenary authority to articulate the policy embodied in the Act and to fill in details omitted by the congressional drafters.<sup>67</sup> The NLRB is authorized to issue orders which are to be enforced by the courts unless they find that the Board has abused its discretion, according to statutory limits.<sup>68</sup> The result is an adjudicative system that receives and processes much litigation. In fiscal year 1980, for example, some 31,000 unfair labor practice charges were filed with the NLRB, 3,882 of these in connection with application of the NLRA, to the trucking industry, which had approximately 1.2 million employees.<sup>69</sup>

The system for interpreting the RLA is completely different. The NMB has certain important responsibilities,<sup>70</sup> but they do not include articulating the policy of the RLA (except with respect to certain aspects of employee representation).<sup>71</sup> Rather, statutory interpretation is left to the courts. In fiscal year 1980, 185 cases were filed in the federal courts in which jurisdiction was based on the RLA.<sup>72</sup> In that year, combined employment in the railroad and airline industries was 991,000. Thus, the incidence of federal court litigation with respect to employees potentially affected was somewhat less under the RLA than under the NLRA.<sup>73</sup> The availability under the NLRA of an administrative forum, processing thousands of cases a year involving statutory interpretation, is important here. The NLRB decisions induce the parties to order their affairs according to what the government decides in their case, or more frequently, according to what the government *probably* would decide.

Under the RLA, the outcome of litigation is less certain because

67. See National Labor Relations Act § 6, 29 U.S.C. § 156 (1982).

68. See National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1982).

69. FORTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD, 9 (1980).

70. Railway Labor Act § 5. See 45 U.S.C. 155. For a historical review of the NMB's role, see C. REHMUS, THE NATIONAL MEDIATION BOARD at 50 (1984).

71. See *id.*, Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 158-59 (1969).

72. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR, Table C-2 at 368 (1981).

73. The incidence of representation cases under the two statutes can be compared by comparing industry statistics from the annual reports of the National Mediation Board and the National Labor Relations Board. From 1960 to 1980, representation cases per employee in the trucking industry ranged from a low of 5.5 cases per 10,000 employees in 1968 to a high of 9.4 cases per 10,000 employees in 1976. In 1980 the incidence was 7.1 cases per 10,000 employees. Under the Railway Labor Act, the incidence was of smaller magnitude with a low of 5.6 cases per 100,000 employees in 1964 and high of 13.0 cases per 100,000 employees in 1978. In 1979, the incidence was 1.2 cases per 100,000 employees.

From 1960 to 1980 district court suits filed under the Railway Labor Act ranged from a low of 6.3 suits per 100,000 employees in 1960 to a high of 23 suits per 100,000 employees in 1971 to 1979. In 1980 the ratio was 19 suits per 100,000 employees. In the trucking industry, unfair labor practices ranged from a low of 8.7 proceedings per 10,000 employees in 1960 to a high of 25 proceedings per 10,000 employees in 1980.

This rough measure suggests that the incidence of litigation is about five times as great under the National Labor Relations Act as under the Railway Labor Act.

there is not as much precedent. For example, not until 1957 did the Supreme Court decide whether strikes were permitted over grievance disputes—thirty-one years after the RLA was enacted.<sup>74</sup> Not until 1971 did it decide whether the duty to bargain in good faith was subject to judicial enforcement, involving scrutiny of whether the parties' conduct met the statutory requirements.<sup>75</sup> Not until 1969 did the Supreme Court address the question of what types of economic pressure are permitted to the parties after the Act's major dispute processes have been exhausted.<sup>76</sup> Before these cases were decided, the parties faced substantial uncertainty with respect to fundamental issues of statutory interpretation. The result is greater likelihood that RLA parties will settle a dispute relating at least peripherally to statutory interpretation on an ad hoc basis rather than by applying a body of administrative and judicial case law.

### 3. BARGAINING REPRESENTATION

Though both American statutes require that a single bargaining representative be chosen according to the desires of the employees in a defined unit, the NLRA initially is more interventionist than the RLA. The NLRA contains detailed procedures for election unit definition and selection of the employee bargaining agent. This permits regulation, investigation, and adjudication of recognition problems by the NLRB.<sup>77</sup> Moreover, each party can use these mechanisms to burden the other, both procedurally and economically, and thus indirectly affect the other party's relative position in the recognition dispute. No comparable ability exists under the RLA. This is primarily because of the NMB's method of resolving representation disputes, a method it has developed with labor and management over the years, rather than because of the Act's express terms.<sup>78</sup>

The bargaining unit has been defined as the "formal arena of employee organization efforts and the framework of mutual bargaining duties at the base of the entire collective bargaining process."<sup>79</sup> The NLRA provides for the organization of employees in "a unit appropriate for such purposes."<sup>80</sup> This can be compared to the RLA protection for employees to organize and bargain collectively through any "craft

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74. See *Railroad Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30 (1957).

75. See *Chicago & N.W. Ry. Co. v. United Transp. Union*, *supra* note 15, 402 U.S. at 570.

76. See *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

77. See National Labor Relations Act § 9, 29 U.S.C. § 159.

78. See NATIONAL MEDIATION BOARD, ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD 1934-70 (1971); Eischen, *Representation Disputes and Their Resolution in the Railroad and Airline Industries*, C. REHMUS, ed., THE RAILWAY LABOR ACT AT 50, 23, 31 (1976).

79. C. MORRIS, ed., THE DEVELOPING LABOR LAW 413 (1983).

80. 29 U.S.C. § 159(a) (1982).

or class.”<sup>81</sup> While organization and certification of a bargaining unit is central to the commencement of a collective bargaining relationship, a collective bargaining structure is not merely a function of an “election district” under the law. A mature bargaining structure also includes informal work groups of employees, the actual negotiation unit, and units of direct impact, i.e., those employees and employers affected by a collective bargaining agreement.<sup>82</sup> These groups or units change not only over time, but also as the issues discussed in bargaining change.<sup>83</sup>

Although the NLRB has substantial discretion to determine the “appropriateness” of a unit and to determine the manner in which the necessary majority status for a bargaining agent can be shown, courts ultimately can review whether its determinations comply with statutory standards. In a fair number of cases, the NLRB decisions are overturned by the courts.<sup>84</sup> Under the RLA, in contrast, bargaining unit decisions are virtually unreviewable by the courts<sup>85</sup> and little law exists on the standards for reviewing bargaining agent selection decisions.<sup>86</sup>

#### 4. THE DUTY TO BARGAIN

Both American statutes go further than the British model in promoting agreements; they impose a legally enforceable duty to bargain in good faith, and provide machinery to help the parties reach agreement. The NLRA is highly interventionist respecting the duty to bargain. The NLRB closely superintends the scope of agreements and the handling of specific proposals at the bargaining table. The RLA in practice involves much less government intervention despite an implied duty similar to that contained in the NLRA.

The NLRA originally focused primarily on the importance of union recognition and did not concentrate on what took place after the proper

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81. 45 U.S.C. § 152 Fourth (1982).

82. UNIVERSITY OF CHICAGO, *THE STRUCTURE OF COLLECTIVE BARGAINING*, xviii-xix (A. Weber, ed. 1961) (hereinafter *THE STRUCTURE OF COLLECTIVE BARGAINING*).

83. *Id.* at xix-xx.

Thus each bargaining structure is comprised of clusters of bargaining units that are super-imposed on each other in a broad system of decision-making. The resulting structure is inherently unstable and may be altered with any change in the variables that determine the size and scope of the bargaining units or the relationships among the units themselves.

84. See *Leedom v. Kyne*, 358 U.S. 184 (1958); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984) (denying enforcement because NLRB arbitrarily defined unit) (Posner, J.). See generally *THE DEVELOPING LABOR LAW*, *supra* note 68, at 1714-19.

85. *Compare Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943) with *Russell v. Nat'l Mediation Board*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2385 (1984).

86. See *Russell v. Nat'l Mediation Board*, *supra*; *Teamsters v. Railway & Airline Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968).

union had been recognized.<sup>87</sup> Recognizing that representation is merely the first step in the process, however, the framers of the NLRA used the duty to bargain to protect a union that “won an election but lacked the economic power to use the strike as a weapon for compelling the employer to grant it real participation in governing the plant.”<sup>88</sup> This statutory duty, enforceable by the NLRB, has provided the foundation for “government regulation of the processes of negotiation, of the scope of the contract and the terms on which a bargain can be struck.”<sup>89</sup>

The existence of a statutory duty to bargain—and the means to enforce it—are fundamental engines of governmental intervention into the bargaining process.<sup>90</sup> The Supreme Court recently reiterated that the NLRA contemplates that the NLRB play an important role in defining the duty to bargain to facilitate collective bargaining.<sup>91</sup> The court emphasized the need for the parties to be able to anticipate the exact limits of their legal duty.<sup>92</sup>

The concept and practice of impasse vivifies the interventionist underpinnings of the NLRA. The NLRB and the courts have read into the employer’s statutory duty to bargain a requirement that the parties reach an impasse before the employer is free to pursue economic action in the form of unilateral changes in working conditions.<sup>93</sup> Impasse has been called an inherently vague and fluid standard,<sup>94</sup> and occurs “after good faith negotiations have exhausted the prospects of concluding a settlement.”<sup>95</sup> The NLRB considers it very much a question of fact requiring detailed Board examination of several factors, including the parties’ state of mind.<sup>96</sup> Whether an impasse exists depends on “the bargaining history, the parties’ good faith in negotiations, the length of ne-

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87. Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 389 (1950).

88. Cox, *Government Regulation of the Negotiation and Terms of Collective Agreements: An Address*, 101 U. PA. L. REV. 1137, 1138 (1953).

89. *Id.* at 1139.

90. See Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) (suggesting that National Labor Relation Act be amended to permit compulsory interest arbitration of first contract disputes because of the weakness of the duty to bargain under the Act).

91. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

92. *Id.*

93. *NLRB v. Katz*, 369 U.S. 736 (1962). Ironically, the NLRB has held that the more aggressive economic weapon of a lockout is available before impasse. *Hooker Chem. & Plastics Corp. v. NLRB*, 573 F.2d 965 (7th Cir. 1978). *Darling & Co.* 171 NLRB 801 (1948), *enforced sub nom Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969).

94. *Compare NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 352 (Harlan, J., concurring in part, dissenting in part) *with National Fresh Fruit & Vegetable Co. v. NLRB*, 565 F.2d 1331 (5th Cir. 1978).

95. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

96. *Id. Compare Dust-Tex. Serv., Inc.*, 214 NLRB 398 (1974) (no impasse where employer intended to change wage structure regardless of negotiations) *with Supak Manuf. Corp.*, 192 NLRB 1228 (1971), *enfd.* 470 F.2d 998 (4th Cir. 1973) (no impasse where employer withheld counteroffer to last bargaining session).



gotiations, the importance of the issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.”<sup>97</sup> Employers who misjudge the bargaining atmosphere and make unilateral changes before reaching this somewhat metaphysical state, risk committing an unfair labor practice for failure to bargain in good faith.<sup>98</sup>

This detailed government supervision of the scope of collective bargaining implies substantially more intervention than if the government had only established the right of employees to organize and left the rest to the parties.<sup>99</sup> But the duty to bargain in good faith has resulted in even more intervention than would result from merely defining the scope of bargaining. The NLRB has scrutinized employer and union responses to specific substantive proposals<sup>100</sup> and has circumscribed the power tactics that can be used during bargaining.<sup>101</sup> In Fiscal Year 1979, 20 percent of the unfair labor practice charges filed against employers involved duty to bargain. This was the second most common allegation. The most common, accounting for 47 percent, were for discrimination for exercise of Section 7 rights. Unfair labor practice charges against unions involved the duty to bargain in 7 percent of the cases. Eighty to 90 percent of the disputes were resolved before full-blown administrative hearings were held, and the remainder were addressed in a procedural framework modelled on a judicial trial.<sup>102</sup> Many of the settlements probably were influenced by legal advice as to the probable outcome of a full NLRB proceedings, based on the extensive body of precedent generated each year.

On occasion the Supreme Court has limited the Board’s superintending of the details of the bargaining process,<sup>103</sup> but there is no doubt that the level of intervention by the Board has been great. From 1935 to 1980, federal courts upheld NLRB handling of unfair labor practice cases in 64 percent of the cases and overturned or required modification

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97. *Taft Broadcasting*, *supra* at 478.

98. Impasse suspends, but does not terminate, the duty to bargain in good faith. The employer must constantly evaluate all developments, internal and external to the business, lest he violate Section 8(a)(5), because

a legal impasse may end suddenly; almost any changed condition or circumstance will terminate the suspension of the duty to bargain. A strike after impasse is reached changes the bargaining atmosphere and indicates that bargaining must be resumed, as do changes in the business outlook of the general industry or of the employer’s specific firm, or a substantial change in the bargaining position of one party.”

C. MORRIS, ed., *THE DEVELOPING LABOR LAW* (2d ed.), 638 and cases cited therein (1983).

99. See Cox & Dunlop, *supra* note 76, at 390.

100. See, e.g., *First Nat’l Maintenance v. NLRB*, *supra*, and *Teamsters v. NLRB*, \_\_\_\_\_ F.2d \_\_\_\_\_ (8th Cir. 1985), 1985 DAILY LABOR REPORT No. 52 at D1 (March 3, 1985) (court decided whether a five-month-old bargaining proposal was still on the table).

101. See, e.g., *NLRB v. Ins. Agents*, 361 U.S. 477, 478–500 (1960).

102. FORTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD, Table 19A (1980).

103. See *Insurance Agents*, 361 U.S. at 483–87, 496–500.

or further Board action in only 36 percent of the cases.<sup>104</sup>

Under the RLA, the existence of a similar enforceable duty to bargain in good faith was at first questionable. The duty for management and labor "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes . . ." under Section 2 of the Act first was used in 1937 to justify an injunction requiring little more than the recognition of a certified representative.<sup>105</sup> Later, it was used to limit economic action until the Act's mediation and fact-finding processes had an opportunity to facilitate private agreement.<sup>106</sup> Professor Weber observed in 1962 that the scope of bargaining under the RLA properly should be conceived of as having been defined mostly by economic power rather than by law.<sup>107</sup> The Supreme Court later held that this duty to bargain in good faith contained a standard that could be applied directly by the courts, thus suggesting that the RLA provided a basis for as much intervention to enforce a duty to bargain in good faith as the NLRA.<sup>108</sup> Nevertheless, the absence of an expert, specialized administrative agency with enforcement jurisdiction over the duty, combined with judicial awareness of the tradition of limited intrusion into RLA bargaining,<sup>109</sup> has left much to abstentionism.

Thus the two Acts differ significantly in the government's role in enforcing a duty to bargain. The NLRA is highly interventionist, with the NLRB closely superintending the scope of bargaining and the handling of specific proposals at the bargaining table. The RLA, despite its inclusion of a duty similar to that contained in the NLRA, in practice involves much less government intervention.

##### 5. DYNAMIC vs. STATIC BARGAINING

The method of collective bargaining under both the RLA and the NLRA has come to be largely "static" in character rather than the "dynamic," that characterizes the British abstentionist tradition. Cox and Dunlop observed in 1950 that: "As the institution of collective bargaining developed, a distinction emerged between (1) disputes over the terms of a new collective bargaining agreement and (2) disputes arising under

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104. NLRB ANNUAL REPORT, *supra* note 102.

105. *See* *Virginian Ry. Co. v. Sys. Fed'n* No. 40, 300 U.S. 515 (1937).

106. *See* *Chicago & N.W. Ry. Co. v. Transp. Union*, *supra*, 402 U.S. at 574 (1971).

107. *See* Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49 (1962).

108. *See* *Chicago & N.W. Ry. Co. v. Transp. Union*, *supra*, 402 U.S. 570.

109. *Id.* at 588-594 (Brennan, J., dissenting); *Adams v. Fed. Express Corp.*, 547 F.2d 319, 321 (6th Cir. 1976). The concept of impasse has no direct RLA analogue since, in virtually all cases, the use of economic weapons depends on the National Mediation Board's decision to terminate mediation. The NMB's decision to terminate mediation may turn on its evaluation of factors similar to those weighed by the NLRB, however. *Compare* C. REHMUS, *THE NATIONAL MEDIATION BOARD* AT 50 (1984) with *Taft Broadcasting*, *supra*, 163 NLRB at 478.

an existing agreement.<sup>110</sup> Though the observation was directed at practices under the NLRA, the distinction is precisely the same as that described by the difference between "major disputes" and "minor disputes" under the RLA.<sup>111</sup> The "customary practice" described by Cox and Dunlop was to deal with issues concerning the terms of a new agreement only at the periodic conferences looking to the negotiation of such an agreement, while disputes arising under an existing agreement were handled under private arbitration procedures.<sup>112</sup> This "customary practice" describes "static" bargaining and is the prevailing practice under both the RLA and the NLRA today. When Cox and Dunlop wrote, there still was substantial controversy over the right of an NLRA employer or union to demand changes in the provisions of an agreement during its term. Their article forcefully argued that there should be no such right, enforceable legally by the NLRB or economically by a strike. That preference has been adopted by the NLRB and the courts.<sup>113</sup>

There are vestiges of "dynamic" bargaining under the RLA, however, that influence the interpretation of that statute. Railroad collective bargaining agreements commonly are not of a fixed duration. Periodic requests for changes in specific wage rates or rules are made by filing a statutory notice of intent to change an existing agreement under Section 6 of the RLA.<sup>114</sup> Until about twenty years ago, it was common for such notices to be served on various issues at different times, resulting in almost continuous bargaining. More recently, it has become the usual practice to negotiate "moratorium" provisions in national railroad agreements covering a number of issues so that agreements for a specific term are more comprehensive and the bargaining practice more static. Nevertheless, bargaining by individual railroads on issues not addressed in national negotiations remains dynamic.<sup>115</sup>

Airline bargaining always has been more static than railroad bargaining, and therefore it would be misleading to attribute dynamic bargaining to explicit provisions of the RLA and static bargaining to explicit provisions of the NLRA.<sup>116</sup> However, the historical tradition of dynamic bargaining in the railroad industry influenced the language

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110. Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950).

111. See Railway Labor Act, § 2, 45 U.S.C. § 151(a)(4), (5). (1982).

112. Cox & Dunlop, *supra* at 1097.

113. See National Labor Relations Act, § 8(d), 29 U.S.C. § 158(d) (1982).

114. See Railway Labor Act, § 6, 45 U.S.C. § 156 (1982).

115. Curtin, *The Future of Multiemployer Bargaining in the Transportation Industry*, in VILLANOVA LAW SCHOOL CENTER FOR CONTINUING LEGAL EDUCATION, SYMPOSIUM ON TRANSPORTATION LABOR ISSUES FOR THE 1980's (May 17-18, 1982).

116. See *Cox v. Northwest Airlines, Inc.*, 319 F. Supp. 92, 98 (D. Minn. 1970) (peculiarity of railroad agreements, compared with airline agreements).

of Section 6 of the RLA and has guided its interpretation.<sup>117</sup>

### III. Contemporary Issues Affecting Collective Bargaining Under the RLA and the NLRA

We have discussed how legal regulation of collective bargaining under the RLA and the NLRA has been influenced by their different conceptual origins: the RLA from the British abstentionist tradition; the NLRA from a distinctly interventionist approach. Today, there are two major differences between the two Acts which substantially affect collective bargaining in the transportation field. These are (1) the control of timing of economic action, and (2) the determination of bargaining units. The RLA and the NLRA provide different mechanisms and procedures for dealing with each. In this section we discuss whether, given the two Acts' different conceptual approaches, the RLA's or the NLRA's method for dealing with each issue is better. This perspective is continued in the following section where we consider whether the two Acts should be consolidated and if so, whether specific provisions of each Act are superior. The evaluation of the two statutes proceeds from this article's theme: collective bargaining in a deregulated transportation marketplace. Today, the debate between abstentionist and interventionist regulation perhaps is as fresh as it was more than fifty years ago.<sup>118</sup>

#### A. Control of Timing of Economic Action

Economic action is not antithetical to national labor policy; it merely is one method to resolve disputes between labor and management.<sup>119</sup> Indeed, the strike acts "as the motive power which induces a modification of extreme positions and then a meeting of the minds. The acceptability of certain terms of employment is determined in relation to the losses of the work stoppage that can be avoided by agreement."<sup>120</sup> Labor's right to strike is protected by both statutes, implicitly by the

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117. See *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir. 1964) (Railway Labor Act imposes a duty to continue objective terms and conditions of employment during bargaining despite agreement by parties to the contrary); *ALPA v. Pan American World Airways, Inc.*, CV-84-4878 (S.D.N.Y. 1985) appeal docketed No. 85-2048, U.S. Court of Appeals for the Second Circuit (requiring carrier to adjust wages upward at end of concession agreement).

118. See, e.g., Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984). Prof. Weiler argues that changes to the National Labor Relations Act are desirable to strengthen legal remedies for employer recalcitrance during first contract negotiations, and to increase the rights of unions to use secondary pressure in certain situations. His first recommendation is interventionist; his second is abstentionist.

119. COMMITTEE FOR ECONOMIC DEVELOPMENT, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY*, 86-91 (1961); J. HUTCHINSON, *MANAGEMENT UNDER STRIKE CONDITIONS* 56-60 (1966).

120. G. Taylor, *Is Compulsory Arbitration Inevitable?*, PROCEEDINGS OF THE FIRST ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, 64 (1948).

RLA<sup>121</sup> and explicitly by the NLRA.<sup>122</sup> Reciprocity generally prevails. Transportation management can change working conditions unilaterally as a weapon of economic action,<sup>123</sup> although other action, such as the lockout, may not be available if it impedes compliance with common carrier or similar statutory duties.<sup>124</sup>

The relative strength of the parties to the collective bargaining process changes over time; generally, labor's strength increases in expanding business cycles, and in corollary fashion management's strength increases in business downturns. Labor's strength is at its nadir in recessionary times, when limited availability of other income opportunities, and increased supply and willingness of replacement workers, make strikes risky for employees.<sup>125</sup> Seasonal factors in business also make disruption of operations more or less costly to one side or the other, depending on the timing. Like other industries, the transportation industry has seasonal patterns of high and low volume. For example, general freight traffic is heavy around September, October, and November, in preparation for the Christmas rush, but slackens in December and January. Demand for passenger travel surges just before Thanksgiving, Christmas, and Easter. The moving and storage industry's busy season commences around Memorial Day. Grain must move at harvest time. Transportation services cannot be stockpiled, and therefore disruptions to operations when and where demand is high could mean serious loss of revenue for transportation companies.<sup>126</sup>

The two Acts differ significantly in the extent to which labor and management may control when the right of economic action can be exercised. It is appropriate to consider whether this difference is important, and if so, what it means for the balance of power between labor and man-

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121. *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 379 (1969); *Railway Clerks v. Florida East Coast Railway*, 384 U.S. 238 (1966); *Locomotive Engineers v. Baltimore and Ohio RR.*, 372 U.S. 284 (1963).

122. 29 U.S.C. § 163 (1976).

123. For railroads and airlines, see *Railway Clerks v. Florida East Coast Railway*, *supra*, 384 U.S. at 238; *Locomotive Engineers v. Baltimore & Ohio RR.*, *supra*, 372 U.S. at 284. For transportation companies covered by the NLRA, see *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

124. See *Ashley, Drew & Northern Ry Co. v. United Transportation Union*, 625 F.2d 1357, 1369-70 (8th Cir. 1980), and cases cited therein. See also Clifford, *Motor Carrier's Duty of Service in Conflict with the Protected Right of Employee Drivers to Honor Picket Lines at Shipper Premises*, 49 I.C.C. PRAC. J. 142 (1982). The lockout also may not be available to rail and air carriers because economic action may be limited to those changes in working conditions management sought in negotiations. See *Brotherhood of Railway Clerks v. Florida East Coast Railway*, *supra*, 384 U.S. at 238.

125. R. WALTON & R. MCKERSIE, *A BEHAVIORIAL THEORY OF LABOR NEGOTIATIONS*, 75-82 (1965).

126. *Id.* See also Levinson, *supra* note 3, and H. LEVINSON, C. REHMUS, J. GOLDBERG, & M. KAHN, *COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION*, 499-500 (1971).

agement,<sup>127</sup> and collective bargaining in the transportation industry.

# 1. THE RAILWAY LABOR ACT

Under the RLA, the parties may not exercise economic action until the major dispute procedures of the Act have been exhausted.<sup>128</sup> These procedures include negotiation, mediation and perhaps an emergency board; a process which has been characterized as "almost interminable."<sup>129</sup> As described above, RLA agreements do not expire or terminate as is the custom under the NLRA. Rather, agreements become subject to change through the service of a notice for bargaining under Section 6 of the Act. The RLA does not regulate the service of such notices,<sup>130</sup> and consequently bargaining proposals can be submitted at any time. Moratorium clauses that limit the service of notices under Section 6 of the Act are used to bring some stability to bargaining.<sup>131</sup> In effect, the parties agree to forego bargaining on certain subjects for a period of time, with a consequential waiver of the right to economic action, which the courts will enforce.<sup>132</sup>

Once the service of bargaining notices under Section 6 is permitted by a moratorium, however, the parties' right of economic action is controlled by the NMB. The NMB determines when to abandon mediation and to proffer arbitration under Section 5 of the RLA. The right to engage in economic action is achieved thirty days after the proffer is rejected by one party, but can be postponed further if the NMB recommends to the President that an emergency board should be created to report on the dispute. If such a board is appointed, the right of economic action is postponed until thirty days after the emergency board report is issued.

The NMB's control of the timing of economic action is virtually im-

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127. For an excellent judicial comparison of strike and lockout tactics, and their effect on business operations, see Justice Goldberg's concurring opinion in *American Ship Building Co. v. NLRB*, *supra*, 380 U.S. at 329-335.

128. *Detroit & Toledo Shoreline Railroad v. United Transportation Union*, 396 U.S. 142, 151-52 (1969); *Railroad Trainmen v. Jacksonville Terminal Co.*, *supra*, 394 U.S. at 369.

129. *Detroit & Toledo Shoreline Railroad v. United Transportation Union*, *supra*, 396 U.S. at 149. The Supreme Court noted recently that these procedures have been made even more "long and drawnout" by recent amendment of the RLA to cover publicly-owned commuter rail lines, authorizing a second, "final-offer," emergency board. *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 689 (1982).

130. The Act is silent on when notices may be served, but efforts to change a working condition which come soon after conclusion of an agreement on that condition may be considered a breach of that party's implicit obligation to bargain in good faith, and therefore unlawful. *Railroad Trainmen v. Akron & B.B. R. Co.*, 385 F.2d 581, 597 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968).

131. *Seaboard World Airlines v. Transport Workers*, 425 F.2d 1086 (2d Cir. 1970), *reaff'd*, 443 F.2d 437 (2d Cir. 1971).

132. *Id.* See also *St. Louis Southwestern Railway Company v. Transportation Union*, 646 F.2d 230 (5th Cir. 1981); *Flight Engineers v. American Airlines*, 303 F.2d 5 (5th Cir. 1962).

mune from judicial review.<sup>133</sup> At least one court has rejected the parties' efforts to regulate the timing of economic action by agreement.<sup>134</sup> In essence, the RLA version of dynamic bargaining is subordinated to a public policy disfavoring interruption of transportation; abstentionist regulation is accommodated to perceived public inability to tolerate transportation strikes.

## 2. NATIONAL LABOR RELATIONS ACT

Unlike the RLA, which, as a matter of policy postpones the right of economic action,<sup>135</sup> the NLRA allows economic pressure except as regulated expressly by the Act,<sup>136</sup> or through a collective bargaining agreement. Once the parties have reached an agreement, Section 8(d)<sup>137</sup> requires sixty days advance notice of a party's desire to change the terms of the agreement. Economic action that occurs before that time has expired is an unfair labor practice<sup>138</sup> and employees who take such action lose their protected status under the Act and may be replaced permanently.<sup>139</sup> The requirement of a notice of a desire to change an agreement does not vary in concept from Section 6 of the RLA, though the enforcement mechanisms are different. If the agreement is for a fixed term, however, the sixty-day notice of desire to change the agreement may be modified or terminated.<sup>140</sup> Thus statutory approval is given to agreements for a fixed term.

Section 8(d) does not delay economic action over matters not covered by a collective bargaining agreement, and not otherwise disposed of in negotiations, until the end of the contract term; only a sixty-day notice is

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133. In *Machinists v. National Mediation Board*, 425 F.2d 527, 537 (D.C. Cir. 1970), the court held the NMB could be ordered to terminate mediation only upon a finding that the NMB had acted "on a basis that is completely arbitrary for a period of time that is completely and patently unreasonable." See also, Krislov, *Mediation under the Railway Labor Act*, 27 LABOR L. J. 310 (1976).

134. *Trans International Airlines, Inc. v. Teamsters*, 650 F.2d 949 (9th Cir. 1980).

135. *Texas & New Orleans Railroad v. Railway Clerks*, 281 U.S. 548, 565 (1930). See also *Detroit & Toledo Shoreline R.R. v. United Transportation Union*, *supra*, 396 U.S. at 148 n.13.

136. National Labor Relations Act, § 13, 29 U.S.C. § 163 (1982). See also *NLRB v. Katz*, 369 U.S. 736 (1962); *Hooker Chem. & Plastics Corp. v. NLRB*, 573 F.2d 965 (7th Cir. 1978); *Taft Broadcasting*, 163 NLRB 475 (1967).

137. 29 U.S.C. § 158(d) (1982).

138. Notice of the dispute must also be given to the Federal Mediation and Conciliation Service, and the appropriate state agency with similar functions, thirty days after the initial notice is effective to permit publicly sponsored conciliation measures. This requirement is enforced in a flexible manner, however, recognizing the realities of the collective bargaining process. Compare *United Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 838 (1965); *Hooker Chemicals & Plastics Corp. v. NLRB*, *supra*, and *KCW Furniture, Inc. v. NLRB*, 634 F.2d 436 (9th Cir. 1980).

139. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Sands Manufacturing Co.*, 306 U.S. 332 (1939).

140. *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957). See also *KCW Furniture, Inc. v. NLRB*, *supra*, 634 F.2d at 436.

necessary as to those issues.<sup>141</sup> This has led to the development of the "zipper clause,"<sup>142</sup> where effectively the parties waive bargaining rights, and ultimately economic action, until the entire agreement, or a portion thereof, can be reopened.<sup>143</sup> Other examples of regulation of economic action through agreement are no-strike and mandatory arbitration clauses,<sup>144</sup> and corollary no-lockout provisions.<sup>145</sup> In sum, under the NLRA the parties can regulate through their respective power and influence in negotiation when during the business cycle and seasonal fluctuations economic action can be taken.<sup>146</sup>

An exception to this arises in cases of national emergency disputes where the President may form a board of inquiry to report on the facts of the dispute, and direct the Attorney General to petition for an anti-strike injunction if the national health and safety is in peril.<sup>147</sup> Economic action is postponed until the NLRB certifies that the employees have rejected, by secret ballot, the employer's last offer, whereupon the injunction is vacated. The President may then recommend a resolution of the dispute to the Congress.

In practice, utilization of the emergency disputes procedure under the NLRA with respect to multi-employer bargaining in the trucking industry can affect timing of economic action in the same general way as the use of the emergency dispute procedure does under the RLA, except that the former does not provide for public recommendation. A material difference, however, is that under the NLRA, trucking labor and management could still set a contract expiration date and thereby control the timing of the right of economic action; the emergency dispute procedures, if applicable, would merely extend the deadline. Under the RLA, the duration of the mediation stage is unpredictable and uncontrollable by the parties. Moreover, the NMB, having general jurisdiction over all

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141. *UMW Local 9735, v. NLRB*, 258 F.2d 146 (D.C. Cir. 1958), *rev'd* 117 NLRB 1072 (1956); *NLRB v. Jacobs Manufacturing*, 196 F.2d 680 (2d Cir. 1952); *c.f.* *United Electrical Workers v. NLRB*, 223 F.2d 338 (D.C. Cir.), *cert. denied*, 350 U.S. 981 (1956). If issues are discussed in negotiation, but the agreement is silent as to those issues, the right to bargain and pursue economic action may be lost for the term of the agreement. *See, e.g.*, *Timken Roller Bearing v. NLRB*, 325 F.2d 746 (6th Cir. 1963); *U.S. Steel Corp. v. Nicholas*, 229 F.2d 396 (6th Cir. 1956).

142. *Radioear Corp.*, 214 NLRB 362 (1974), supplementing 199 NLRB 1161 (1972); *GTE Automatic Electric, Inc.*, 261 NLRB No. 1491 (1982); *Columbus & So. Ohio Electric*, 270 NLRB No. 95 (1984).

143. *Id.* For an excellent general discussion of the development for the zipper clause and its effect on collective bargaining under Section 8(d), *see* NLRB General Counsel Advise Memorandum, Case No. 4-Ca-9586, 99 LRRM 1724 (1978).

144. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974).

145. *American Ship Building v. NLRB*, *supra*.

146. The NLRB and the courts have reduced the scope of employer economic action if impasse has not been reached when the sixty day period in Section 8(d) expires. A lockout may be pursued prior to impasse, but not unilateral changes in working conditions. *See* text accompanying notes 141-146 *supra*.

147. 29 U.S.C. §§ 176-180 (1982).



disputes under the Act, can adjust strike timing in one dispute to achieve objectives in another dispute.<sup>148</sup>

Except for emergency disputes, when presidential intervention is monitored judicially,<sup>149</sup> NLRA regulation of the timing of economic action is decidedly abstentionist; unless limited by voluntary action of the parties, such action can proceed at any time after sixty days notice.

### 3. POLICY ISSUES

The structure of the transportation industry has changed so radically over the last fifty years that governmental control of strike timing in freight transport seems less necessary than it did in 1926. When the RLA was enacted in 1926, railroads had a virtual monopoly on the interstate movement of goods. The postponement of strikes was important to interstate commerce; a major rail strike would have crippled large areas of the country.<sup>150</sup> Today, more freight is hauled by truck than by rail; the portion of traffic dependent on rail has been greatly reduced. In 1939, railroads moved approximately 75 percent of intercity tonnage, trucks 10 percent, pipelines 5 percent, and 10 percent moved by water. By 1983, rail's share had declined to approximately 27 percent, the share moved by truck had increased to 37 percent, pipelines 18 percent, water carriers 18 percent, and the balance moved by air.<sup>151</sup> Similar statistics describe the change in the transportation modal market shares if measured by ton-miles,<sup>152</sup> or revenues.<sup>153</sup>

These statistics suggest that because today, there are more alternatives available to the shipping community,<sup>154</sup> the harm to interstate commerce resulting from a strike on an individual freight carrier is not as great as it would have been two or three decades ago. This raises the

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148. See Reports of Emergency Board Nos. 194 and 195 (1982) where the Mediation Board terminated mediation in disputes between the rail carriers bargaining arm, the National Railway Labor Conference, and the two operating craft unions, the Brotherhood of Locomotive Engineers and the United Transportation Union, almost simultaneously. The issues in each dispute were virtually the same, although negotiations had been conducted separately. The linkage between the two was vivified in the appointment of the same individuals to both Boards.

149. See *Steelworkers v. United States*, 361 U.S. 39 (1959) (Taft-Hartley emergency dispute procedures require court to determine if factual predicate exists, when the President directs the Attorney General to seek an injunction).

150. N. CHAMBERLAIN & J. SCHILLING, *THE IMPACT OF STRIKES* (1954); Cullen, *Strike Experience under the Railway Labor Act*, in *THE RAILWAY LABOR ACT* at 50, *supra* note 78. See also Taylor, *Collective Bargaining in Transition*, *THE STRUCTURE OF COLLECTIVE BARGAINING*, *supra*, at 343-359. The economic effect of strikes generally was discussed recently in Mitchell, *Collective Bargaining and the Economy*, in *INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT*, 39-44 (J. Stieber, R. McKersie, & D. Mills ed. 1981).

151. TRANSPORTATION POLICY ASSOCIATES, *TRANSPORTATION IN AMERICA*, November 1984.

152. *Id.* A ton-mile is a transportation measurement of one ton of freight carried one mile.

153. *Id.*

154. H. LEVINSON, *et al.*, *supra* note 126, at 499-500 [hereinafter Professor Kahn].

question of whether the RLA interventionist regulation of the timing of economic action on rail or air freight carriers is obsolete: if a strike does not pose significant harm to interstate commerce why should not an individual rail or air carrier and a labor union be able to determine strike timing voluntarily through a collective bargaining agreement? In 1971, the Air Line Pilots Association suggested it might be desirable to permit the parties, rather than the NMB, to determine the schedule of negotiations.<sup>155</sup> If determination of strike timing at the bargaining table is appropriate for a single carrier, it may not be appropriate for multi-employer bargaining in which a regional or a nationwide strike could be at risk. Such bargaining is common in the rail industry, but has not succeeded in the airline industry, despite sporadic attempts by the carriers.<sup>156</sup> Even so, multi-employer bargaining is consensual, or voluntary,<sup>157</sup> and if the parties so elect to organize their affairs, they should be able to regulate the timing of economic action unless there are countervailing considerations.

At the same time that rail share of the freight transportation market was decreasing, intercity passenger transportation by carrier was becoming even more concentrated.<sup>158</sup> Taken alone this fact suggests that the original purpose of the RLA's procedures to postpone strikes may still be a worthwhile objective. But the validity of this conclusion is diminished due to the emergence of new carriers after the Airline Deregulation Act of 1978. With many cities served by multiple carriers, the need of continuous air service by any one carrier is decreased.<sup>159</sup> Also, one commentator has argued that the record reveals the public can and will tolerate an air strike, even on the largest airline.<sup>160</sup> On the other hand, future emergence of multi-employer bargaining might justify the Act's strike delaying procedure, as all competitors on a single route could be shut down by a single strike or because many more communities could be affected by a strike.<sup>161</sup>

Rail and air labor and management have proven capable of dealing with the abstentionist/dynamic aspect of bargaining in a creative way, chiefly through the use of moratorium provisions whereby the parties voluntarily regulate the time for negotiation of agreements. The docu-

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155. Testimony by G. Green, Senate Hearings on National Emergency Disputes 1971-72, at 541 (1971).

156. Curtin, *supra* note 115.

157. *Delaware & Hudson Ry. v. Transportation Union*, 450 F.2d 603 (D.C. Cir. 1971), and cases discussed therein.

158. The percentage of public carrier intercity passengers travelling by RLA carrier increased from 72 percent in 1939 (67 percent rail, 5 percent air) to 90 percent in 1980, virtually all by air. TRANSPORTATION ASSOCIATION OF AMERICA, TRANSPORTATION FACTS AND TRENDS, July, 1980.

159. See material at note 4, *supra*.

160. KAHN, *supra* note 154.

161. See R. WALTON & R. MCKERSIE, *supra* note 125. See also American Ship Building

mented change in industry structure suggests that interventionist regulation of the timing of economic action by the RLA is anachronistic, measured both in comparison with the basically abstentionist approach of the RLA, and in comparison with the realities of dispute settlement. Governmental intervention in transportation strikes may be proper in certain emergency situations, or in certain types of bargaining, but automatic intervention is out of step with market realities and real collective bargaining.

### *B. Bargaining Units*

Generally speaking, two independent factors oppose one another when bargaining structure alternatives are evaluated.<sup>162</sup> First, when labor wishes to organize nonunion employers, it is likely to prefer smaller election units covering only a single geographic location, where employees' interests are not very diverse. It will be easier to organize and bargain for such units. For the same reasons, nonunion management is likely to prefer broader units.

Second, management also is likely to prefer broader units to promote stability. Fewer units means fewer potential strike threats. Fewer units also means that there is less opportunity for employee dissatisfaction to grow from different terms and conditions of employment for apparently similarly situated groups of employees. In manufacturing industries, management preference for broader units in the interest of stability may be tempered by its ability to confront a strike by a narrow unit by transferring production.<sup>163</sup> The integrated nature of transportation may make it difficult to "transfer production" during a strike of even a relatively isolated group of employees.

#### 1. LEGAL DEFINITION OF THE BARGAINING UNIT

Neither the NLRA nor the RLA provides precise criteria for ascertaining the boundaries of the appropriate unit or a particular craft or class, and the relevant literature details how controversial administra-

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Co. v. NLRB, *supra*, 380 U.S. at 300. In multi-employer bargaining situations under the RLA, similar pressure can be exerted by striking only selective carriers. See Newborn, *The Validity of Selective Strikes under the Railway Labor Act*, 60 GEO. L. J. 583 (1972). On the other hand, Professor Kahn notes that a forty-five day strike of five trunk carriers in 1966 failed to create an emergency. KAHN, *supra* note 154.

162. See *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090 (7th Cir. 1984) (describing competing considerations in defining "appropriate unit" under NLRA) (Posner, J.).

163. See Hendricks & Kahn, *The Determination of Bargaining Structure in U.S. Manufacturing Industries*, 35 IND. & LAB. REL. REV. 181 (1982).

tive identification of these boundaries has been.<sup>164</sup> Definition of the appropriate unit under the NLRA is entrusted to the administrative discretion of the NLRB. This discretion is quite broad,<sup>165</sup> especially when compared to the NMB's more limited discretion under the RLA to define a craft or class.<sup>166</sup>

Under the NLRA, labor and management can agree to the bargaining unit,<sup>167</sup> but if the NLRB believes the unit is not appropriate for bargaining, the NLRB is not obligated to ratify any such agreement. Under the RLA, the carrier and the labor organization may not define the perimeters of a craft or class, but may negotiate agreements covering employees in more than one craft or class.<sup>168</sup>

The primary focus under both Acts in determining an appropriate bargaining unit is that employees with a community of interests should be grouped together.<sup>169</sup> The NLRB inquires into a number of factors to test the community of interest: (1) extent and type of union organization; (2) bargaining history for the employees involved and in the particular industry at issue; (3) similarity of duties, skills, interests, and working conditions; (4) structure of the company; and (5) employee desires.<sup>170</sup> However, by statute the Board is precluded from finding a unit inappropriate on the ground that prior determinations established a different unit. Nor may the Board make the extent of union organization controlling.<sup>171</sup>

The craft or class criteria followed by the NMB are substantially similar to those followed by the NLRB. They include: (1) the composition and relative permanency of employee groupings along craft or class lines—(a) for carriers generally and (b) on the individual carrier involved; (2) the extent and effectiveness of past collective bargaining

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164. See generally J. ABODEELY *et al.*, THE NLRB AND THE APPROPRIATE BARGAINING UNIT (rev. ed. 1981); Eischen, THE RAILWAY LABOR ACT AT 50, *supra* note 78. It is ironic that when the craft or class terminology was added to the Railway Labor Act in 1934, one of the principal authors stated it was not necessary to define craft or class because those words had been used in labor parlance for such a long time that there would be no difficulty in determining what was a craft or class of employees. See Statement of ICC Commissioner Joseph Eastman in *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 7650*, 73d Cong., 2d Sess., 45 (May 23, 1934).

165. *NLRB v. Hearst Publications*, 322 U.S. 111, 134 (1944).

166. *Switchmen's Union v. National Mediation Board*, *supra*, 320 U.S. 297; *KLM Royal Dutch Airlines*, 3 NMB 1 (1953). The NMB states that it lacks discretion to determine the boundaries of crafts or classes, but accomplishes the same result by establishing an eligible voter list in disputed cases. See, e.g., *Chicago, Aurora & Elgin Co.*, 1 NMB 229, 238 (1942); *Chicago, North Shore & Milwaukee RR*, 1 NMB 215, 227 (1942).

167. *NLRB v. J. J. Collins' Sons, Inc.*, 332 F.2d 523 (7th Cir. 1964).

168. *Galveston Wharves*, 4 NMB 200 (1962); *American Airlines*, 3 NMB 49 (1959); *Chicago, Aurora & Elgin Ry. Co.*, 1 NMB 329 (1942).

169. See ANNUAL REPORT OF THE NLRB, *supra* note 102, at 39; Eischen, in RAILWAY LABOR ACT AT 50, *supra* note 78, at 35.

170. See generally *Continental Baking Co.*, 99 NLRB 777, 782 (1952); *Chrysler Corporation*, 76 NLRB 55 (1948). See also ABODEELY *et al.*, *supra* note 164.

171. National Labor Relations Act § 9(c)(5). 29 U.S.C. § 159(c)(5) (1982).

agreements—(a) for carriers generally and (b) on the individual carrier involved; (3) the functions, duties, responsibilities and general nature of the work performed by the employees; (4) the community of interest between jobs; and (5) past decisions of the NMB on the issue.<sup>172</sup>

The NMB's authority to determine appropriate classes and crafts is exclusive and not subject to judicial review.<sup>173</sup> The Board has held that craft or class is not the functional equivalent of an appropriate bargaining unit, and that its own discretion to establish units is more circumscribed than that of the NLRB.<sup>174</sup> The Mediation Board also distinguishes craft or class from Interstate Commerce Commission railroad employee compensation classifications,<sup>175</sup> and has indicated a clear preference for craft type, as opposed to industrial type, organization of employees,<sup>176</sup> rejecting NLRB practice to the contrary.<sup>177</sup> The Board has distinguished between railroads and airlines, however, when applying the phrase "craft or class."<sup>178</sup>

## 2. EVOLUTION OF BARGAINING STRUCTURE

Definition of election units by governmental agencies has been criticized by industrial relations specialists as artificial, although the same critics acknowledge that acceptance of legal decisions by labor and management has led to relative stability of bargaining structure.<sup>179</sup> At the very least, certified units become points of departure for the parties; from there, market forces, perceived power, and the interrelationships of the parties affect the evolution of the actual negotiating units. This reflects a dynamic blend of interventionist regulation to certify the unit, and abstentionism thereafter, embracing the experience of the parties. In railroads and trucking, bargaining has evolved from the certified unit to a regional, and then to a national structure,<sup>180</sup> due in part to either strong centralized union leadership<sup>181</sup> or management desire to en-

172. *United Airlines*, 5 NMB 65, 71 (1965).

173. *Railway Clerks v. Association for the Betterment of Noncontract Employees*, 380 U.S. 650 (1965); *Switchmen's Union v. National Mediation Board*, *supra*, 320 U.S. 297.

174. *Pend Oreille Valley Railroad*, 10 NMB No. 129 at 407-8 (1983); *KLM Royal Dutch Airlines*, 3 NMB 1, 2 (1953); *Seaboard Airline Railway*, 1 NMB 167, 173 (1940). *See also* *Switchmen's Union v. National Mediation Board*, *supra*, 320 U.S. at 297.

175. *Chicago, B. & Q. R.R. Co.*, 1 NMB 7 (1936).

176. *Union R.R. Co.*, 4 NMB 276 (1960); *American Airlines*, 1 NMB 394 (1945).

177. *See* *Pend Oreille Valley R.R.*, *supra*, and cases cited therein. *See also* *National Tube Company*, 76 NLRB 169 (1948). Ironically, an effort to establish industrial unionism on the railroads had gathered some early momentum, but floundered in the face of an 1894 injunction and contempt penalties levied against a strike which threatened to close the important Chicago gateway. *In re Debs*, 158 U.S. 564 (1895). *See also* H. JONES, *RAILROAD WAGES AND LABOR RELATIONS 1900-1952*, 31-34 (1953).

178. *Compare* *Union Pacific R.R.*, 8 NMB No. 127 (1981); *United Airlines*, 6 NMB No. 888 (1977); *American Airlines*, 1 NMB 394, 399 (1945) and *Delaware, L. & W. RR*, 1 NMB 394 (1945).

179. *THE STRUCTURE OF COLLECTIVE BARGAINING*, *supra* at 6-7.

180. H. LEVINSON *et al.*, *supra* note 126, at 20-21; LEVINSON, *supra* note 3.

181. *Id.* *See also* M. ESTEY, *THE UNIONS* 45-65 (1967).

hance its power and influence, especially with governmental intervention in perceived emergencies.<sup>182</sup> Coalition bargaining among crafts or classes has occurred in the railroad industry.<sup>183</sup> The airline industry twice has tried multi-employer bargaining but has failed both times; the parties have tried whipsaw tactics to improve bargaining leverage.<sup>184</sup> Nevertheless, fragmentation of bargaining structure remains a problem in both RLA industries.

The NMB consistently has held that it lacks discretion to certify for bargaining any unit other than a "recognized" craft or class, on anything other than a system-wide basis,<sup>185</sup> except in unusual circumstances.<sup>186</sup> This can be compared to the situation under the NLRA where the NLRB, in its exercise of discretion, has favored system-wide units for some transportation companies,<sup>187</sup> but rejected it for others.<sup>188</sup> The NMB continues for the most part to insist on certification of bargaining representatives according to "historic" craft or class lines, notwithstanding the changing face of the transportation industry through new technology, new competition and alteration of industry structure.<sup>189</sup> Indeed, the practice continues despite the NMB's clear authority to "re-group, amalgamate or splinter historic bargaining groups . . ." as conditions change<sup>190</sup> and the fact that the NMB apparently has acquiesced in union policies that tend to shift bargaining structure below the system-wide craft or class to a regional or smaller grouping appropriate to union interests.<sup>191</sup>

NLRB administration of the NLRA, and the Act itself, appear to af-

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182. THE STRUCTURE OF COLLECTIVE BARGAINING, *supra*. See also H. LEVINSON, *et al.*, *supra*. See also Pub. L. No. 97-262, 96 Stat. 1130, which enacted into law the settlement recommended by Emergency Board No. 194 after a four day nationwide strike by the Brotherhood of Locomotive Engineers.

183. H. LEVINSON, *supra* note 126, at Part II.

184. *Id.* 466-501 (Professor Kahn.) One industry spokesman predicted the advent of multi-employer bargaining in 1961. Mason, *Collective Bargaining Structure: The Airlines Experience*, THE STRUCTURE OF COLLECTIVE BARGAINING *supra* note 82, but an attempt involving five airlines failed after one round of bargaining. H. LEVINSON *et al.*, *supra* note 126, at Part II.

185. Air Florida, 7 NMB No. 89 (1979).

186. Ground Services, Inc., 8 NMB No. 35 (1980); Union Pacific Railroad, 8 NMB No. 127 (1981).

187. Interocean Steamship Co., 107 NLRB (1953); Oceanic, Inc., 99 NLRB 480 (1952).

188. Transportation Bus System, Inc., 178 NLRB 712 (1969); Bowman Transportation Company, Inc., 166 NLRB 982 (1967).

189. The NMB does acknowledge however that promotion of rational labor management relations is one of the purposes of the Railway Labor Act. Union Pacific Railroad, 8 NMB No. 127 (1981); Ground Services Inc., 8 NMB No. 35 (1980).

190. Flight Engineers v. National Mediation Board, 294 F.2d 905, 908 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962). See also Railroad Conductors v. United Transportation Services Employees, 320 U.S. 715 (1945); Switchmen's Union v. National Mediation Board, *supra*; British Airways v. National Mediation Board, \_\_\_\_\_ F. Supp. \_\_\_\_\_, 109 LRRM 2527, 2531 (E.D. N.Y. 1982).

191. See, e.g., the Constitution of the United Transportation Union, a union that repre-

ford more flexibility to adapt bargaining structure to changing conditions. Under Section 9(b), either labor or management can petition to clarify or amend the bargaining unit. The NLRB has used its authority in this respect to accommodate bargaining unit certification to changes in business structure or operations. It has thus rejected the perpetuation of historic groupings of employees simply for the sake of history, when changed circumstances has rendered the historic grouping inappropriate.<sup>192</sup>

### 3. POLICY ISSUES

The adaptability of a bargaining structure to changing industry characteristics will be important for the transportation industry in the 1980s. New competition and technology will continue to emerge and put pressure on labor and management. The RLA and NLRA should be examined for what effect each has on evolution of a bargaining structure. From a policy standpoint, the key question is: Are the legal frameworks for bargaining structure flexible enough to promote the development, coordination and preservation of a sound transportation system in a deregulated environment within which collective bargaining plays an appropriate role?

Some evidence exists that industrial type bargaining units, as favored by the NLRB, prove more receptive to change, especially to introduction of new technology that threatens existing jobs.<sup>193</sup> This can be compared to bargaining units along craft or class lines; new technology may threaten to eliminate a craft or class, threatening in turn the union as an institution,<sup>194</sup> with consequential stress on the bargaining relationship.

An excellent example of this lies with the tortuous history of the railroad fireman. This position has been characterized as obsolete, except perhaps as a training position for future engineers.<sup>195</sup> Yet the craft or class of fireman still exists on most railroads, and a decade of litigation was spawned without any beneficial long-term benefit to the railroad

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sents railroad brakemen, firemen and conductors, and bus drivers. The Constitution vests independent negotiating authority in chairmen of general committees of adjustment. These general committees correspond to regional operations of the employer, and there can be as many as ten or eleven general committees per employer, each with independent negotiating authority. *See, e.g.,* *Maloof v. Conrail*, No. 78-1395 (E.D. Pa. 1980).

192. *Cal Central Press*, 179 NLRB 162 (1969); *Libby, McNeil and Libby*, 156 NLRB 677 (1966). *C.f. B. J. Carney Co.*, 157 NLRB 1285 (1966); *Romac Container, Inc.*, 190 NLRB 238 (1971). The Board's guidepost is to make appropriate unit determinations "free from the effect of rigid and inflexible rules." *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967).

193. H. LEVINSON, et al., *supra* note 126, at 60-83. *See also* Shils, *Union Fragmentation: A Major Cause of Transportation Labor Crises*, 25 IND. & LAB. REL. REV. 1 (1971).

194. *Id.* at Part II. *See also* M. ESTEY, *The Unions, supra*, and *Central Railroad Company of New Jersey*, 5 NMB 33 (1974).

195. PRESIDENTIAL RAILROAD COMMISSION (1962); Decision of Arbitration Board No. 282, created pursuant to Public Law No. 88-108, 77 Stat. 129.

industry.<sup>196</sup> To some extent, collectively bargained dual seniority, union merger, and union security provisions eased adjustment. But it is appropriate to ask whether the unit clarification procedure of the NLRA would not have been a better way to resolve the technological obsolescence of the fireman class. Perhaps with the introduction of diesel technology, management could have petitioned for clarification of an engine service bargaining unit, with firemen as trainees, and avoided the turbulent years and emotions of "anti-featherbedding" campaigns. Similarly, the abstentionist tradition of railroad bargaining would have been served if craft consolidation or redefinition along industrial unit lines could have been pursued in collective bargaining, with the parties left to economic action to force readjustment. In the near future new technology may threaten traditional clerical or passenger service functions, and communications and railroad shopcraft lines, inviting revisitation of the fireman dispute.

The NMB has not been completely opposed to the bargaining unit clarification concept. When flight engineers are required to be pilot-certified, the Board has recognized a "flight deck" craft or class.<sup>197</sup> The Board also has expressed a policy preference for avoiding fragmented bargaining groups.<sup>198</sup> But generally, the NMB continues to embrace historic craft or class distinctions that foster a plethora of negotiating units. It revised the class definition for airline ground service personnel, moving from a comprehensive class to separate and individual classes encompassing Passenger Service, Fleet Service, and Office Clerical employees.<sup>199</sup> Recently it refused to certify one single bargaining unit for a carrier despite uncontradicted evidence that the employees' duties and functions were interchangeable.<sup>200</sup>

Changing industry structure also may affect bargaining structure. Recent railroad and airline legislation has made it easier for major carriers to withdraw from markets. Railroads can pursue line abandon-

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196. *See, e.g.*, *Chicago & N.W. Ry. Co. v. Transportation Union*, *supra*, 402 U.S. at 574, and cases cited therein. *Locomotive Engineers v. Baltimore & Ohio RR Co.*, 372 U.S. 284, 285-88 (1963). *See also* *Transp. Union v. Conrail*, 535 F. Supp. 697 (Spec. Ct. Reg. Rail Reorg. Act 1982).

197. *Air Polynesia*, 9 NMB No. 11 (1981); *United Airlines*, 8 NMB 65 (1981). *United Airlines*, 3 NMB 56 (1961). The Board also has acknowledged the evolution of passenger services and office-clerical crafts or classes. *See, e.g.*, *Allegheny Airlines*, 6 NMB No. 1027 (1978); *Air Canada v. National Mediation Board*, 107 LRRM 2028, 2031, (S.D. N.Y. 1980), *aff'd* 659 F.2d 1057 (2d Cir.), *cert. denied*, 50 U.S.L.W. 3351 (1981).

198. NATIONAL MEDIATION BOARD, ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD, 1934-1970, *supra* at 72. *See also* *Grand Trunk Western Railroad*, 12 NMB 67, 73 (1984).

199. *See* *Laker Airways, Ltd.*, 8 NMB 158, 175 (1980); *National Airlines Inc.*, 1 NMB 423 (1947). *See also* *Continental Airlines*, 10 NMB No. 142 (1983).

200. *White City Terminal & Utilities Ry. Co.*, 9 NMB No. 10 (1981). *See also* *Metro North Commuter Railroad*, 12 NMB No. 16 (1984).



ments, and transfer operations to short line carriers.<sup>201</sup> Continuous rail service to communities may depend on an adaptive bargaining structure to merge historic crafts or classes.<sup>202</sup> The same is true for air service, as new airlines emerge to serve communities from which trunk carriers have withdrawn. Insistence on traditional craft or class lines by the NMB may alter the economies of such air service.<sup>203</sup> Willingness to accept new, broader crafts and classes in these circumstances may be desirable not only to permit lower cost operation, it also may be important to facilitate organization of small nonunion carriers.

Policymakers, especially at the NMB, need to consider whether the flexible bargaining unit benefits collective bargaining in the transport industry, and if it does, whether it should be pursued if it compromises employee choice. If employee units can be changed by petition of management or economic action, should a similar right be extended to employees, perhaps to achieve representation below the system-wide basis apparently contemplated by the RLA (e.g., maintenance employees would select bargaining representatives on a facility basis), or beyond a single carrier to include many carriers which together dominate a regional market? It has been suggested that system-wide craft bargaining is essential to labor peace and continuous transportation service,<sup>204</sup> but this conclusion is difficult to square with the trucking experience under the NLRA. Bargaining units began on a city basis, and the parties voluntarily developed other approaches, including regional and national bargaining structures, as the product/service market and technology changed.<sup>205</sup> Reliable transportation service was delivered with less government intervention in bargaining structure.

We should also consider whether the RLA and NLRA bargaining structure standards are really fundamentally different or merely creatures of administrative agency policy which can be changed. Even if the Mediation Board were capable of, and did, relax its bargaining unit standards, what effect would it have if the Board's policy on employer "standing" (or lack thereof) remained in effect? If unit clarification op-

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201. 49 U.S.C. §§ 10903-10906, 10910, 45 U.S.C. § 748 (1981). *See also* Chicago & Northwestern Transportation Co., 363 I.C.C. 975 (1981).

202. One author observed how rail bargainers reduced crew size to two employees, and ignored two traditional crafts, when employees perceived the discontinuance of rail operations by a Class I carrier, and assumption of operations by a smaller Class III carrier with less advantageous working conditions.

203. *See generally* Bruning & Oberdick, *Market Structure and Economic Performance in the Commuter Airline Industry*, 21 TRANSP. J. 76 (1982); Stephenson & Beier, *The Effects of Airline Deregulation of Air Service to Small Communities*, 20 TRANSP. J. 54 (1981).

204. C. REHMUS, THE NATIONAL MEDIATION BOARD AT 50, 88-89 (1984).

205. H. LEVINSON, *et al.*, *supra* note 126 at 20-21; Levinson, *Trucking*, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE, *supra* note 3.

tions are extended to rail and air carriers, should decertification of a bargaining unit also be possible?<sup>206</sup>

The need for more flexibility under the RLA does not require that change should be accomplished by creating more opportunities for litigation over unit definition.<sup>207</sup> The energies devoted to litigation frequently distract the parties from working out a mutually acceptable structure privately. Rather, the NMB could become more flexible in its craft or class policy within its discretion, relatively insulated from judicial review. The NMB should explain fully its reasons for making policy changes in order to reduce the chance that the courts would feel compelled to subject the Board's decisions to greater scrutiny under prevailing concepts of administrative law.<sup>208</sup>

The NMB would not be breaking new ground by becoming more flexible. Its authority to regroup employees for representation purposes is recognized.<sup>209</sup> Indeed, as a means of preventing the deterioration of bargaining structure, it has applied the same concepts to contracting-out of work considered to be traditionally that of railroad or airline employees.<sup>210</sup> This has had a significant effect on airlines which, under deregulation, move into new markets and contract for certain essential services, but retain a great measure of control over the contractor's activities in order to protect service quality. The NMB has not hesitated to develop new representation principles to govern this change in industry structure in an effort to promote realistic collective bargaining.<sup>211</sup>

A persuasive case can be made that the NMB abuses its discretion by refusing to recognize evolving industry patterns. The Board has reconfigured bargaining groups in the past,<sup>212</sup> and its devotion to "well estab-

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206. *Russell v. Nat'l Mediation Board*, *supra*, 714 F.2d at 1332. For more on employer standing in representation matters before the NMB, see *Zantop Intn'l Airlines v. NMB*, 732 F.2d 517 (6th Cir. 1984).

207. Some airlines emerging or expanding under deregulation seek to amend the Railway Labor Act to become more interventionist in representation matters, expanding opportunities for judicial review of the NMB and moving closer to NLRA practice. See, e.g., Testimony by Continental Airlines before the Labor Subcommittee of the Senate Committee on Labor and Human Resources, Sept. 13, 1984.

208. *Russell v. Nat'l Mediation Board*, *supra*. See also *Railway Clerks v. Assoc. for the Betterment of Noncontract Employees*, *supra*, 380 U.S. a 650; *Switchmen's Union v. National Mediation Board*, *supra*, 320 U.S. at 297; *Machinists v. National Mediation Board*, 425 F.2d 527 (D.C. Cir. 1970); *Teamsters Local 732 v. National Mediation Board*, 438 F. Supp. 1357 (S.D.N.Y. 1977).

209. See text accompanying, and notes 189, 190, *supra*.

210. *Ground Services, Inc.*, 8 NMB No. 35 (1980); *Union Pacific R.R.*, 8 NMB No. 127 (1981).

211. *Id.* See also *Crew Transit, Inc.*, 10 NMB 64 (1982); *ARA Environmental Services*, 9 NMB 37 (1981).

212. See note 190, *supra*.

lished principles" is far from consistent.<sup>213</sup> It is difficult to reconcile the NMB's common sense 1974 conclusion that changing technology caused telegrapher work to disappear<sup>214</sup> with later decisions on rail carriers emerging under deregulation, except through political reflections on the parties' size and influence. In the former case the Board sustained a new craft or class following an industry-wide labor agreement,<sup>215</sup> but in the latter insisted on three crafts for a thirteen mile industrial park railroad with five employees in the face of uncontradicted evidence of interchangeable duties.<sup>216</sup> Administrative agencies are allowed to change or reverse course, but to do so without rational explanation is an abuse of discretion inviting court review.<sup>217</sup>

A more flexible representation policy, while perhaps sowing the seeds of easier adjustment to changes in technology and the marketplace, is also consistent with the abstentionist/dynamic bargaining origins of the RLA. The parties may be able to shape their destinies better through joint action, power, influence and accommodation if bargaining units are more reflective of the parties' experience, rather than a least common denominator of employee representation, tested mainly by historical tradition. Too rigid insistence on "historic" craft or class lines risks creating unsound conditions which may retard development, a situation not unlike that which led to economic deregulation of the transportation industry.

### III. A Consolidated Transportation Labor Law

A decade ago, Harold Levinson recommended, as part of a comprehensive examination of labor relations in American transportation, that the provisions of the RLA and NLRA be consolidated with respect to the transportation industry. The purpose was to provide a unified statutory and administrative framework for dealing with public policy

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213. *E.g.*, compare *Pennsylvania Railroad Company*, 1 NMB 23 (1937) ("representation may be designated only for the whole of a craft or class employed by a carrier") with *Ground Services Inc.*, 8 NMB No. 35, and practice on U.S. Air (representation below system wide is tolerated). Compare also an NMB statement that it is not Board policy to "fragment existing crafts or classes," *Grand Trunk Western Railroad*, *supra*, 12 NMB at 73, with its position that it keeps pace with the changing airline industry by breaking the large R-1706 bargaining group into smaller crafts or classes. *Eastern Airlines, Inc.*, 12 NMB 29, 36 (1984). See also *Beckett Aviation*, 254 NLRB 88 (1981) (NLRB certified a unit of pilots at only one of company's five stations).

214. *Central Railroad Company of New Jersey*, *supra*, 5 NMB 33 (1974).

215. *Id.* at 33-34.

216. *White City Terminal*, 9 NMB at 23. *Accord*, *Kyle Railroad*, 11 NMB No. 94 (1984), *Metro North Commuter Railroad*, 12 NMB No. 16 (1984).

217. *Russell v. Nat'l. Mediation Board*, *supra*; *Continental Webb Press, Inc. v. NLRB*, 742 F.2d 1087, 1093-94 (7th Cir. 1984).

issues in this industry.<sup>218</sup> Mr. Levinson thought the history of the two Acts indicated that the separation of railroads and airlines from other transportation modes was a result of historical circumstances that are irrelevant in today's world.<sup>219</sup> Moreover, he noted that despite many surface differences, the substantive provisions of the two laws were very similar in the most important respects: both acts protect the rights of workers to organize without interference; prohibit certain unfair practices by employers; contemplate similar criteria for establishment of appropriate bargaining units; have similar procedures for employee choice of bargaining representatives; deal with emergency disputes in a similar fashion; and provide for administrative or judicial enforcement.<sup>220</sup> Differences in details, emphasis, coverage and procedures were described as having relatively minor importance. Obviously, Mr. Levinson's view did not acknowledge the fundamental differences presented in Part I of this article.

In Mr. Levinson's opinion, the only important differences between the two laws is the specification of various unfair labor practices by the NLRA, and the statutory procedures for grievance adjustment under the RLA. Noting that a consolidated transportation labor law would create some minor problems of a short-term readjustment, he nevertheless stated that there were considerable gains to be achieved from a unified legal framework and administrative procedure, especially since the various sectors of the transportation industry would become increasingly integrated over time.<sup>221</sup> Levinson described two alternatives: first, adoption of a new transportation labor relations law; second, a revision of the NLRA to cover transportation and other industries. Levinson favored the latter approach.

The Levinson recommendations presuppose an explicit choice between the alternative conceptual bases of the two statutes discussed in the first part of this article. Enactment of a new consolidated transporta-

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218. H. Levinson, *Policy Recommendations*, COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION, *supra* note 126, at 640-62. For more comparative analysis, see generally COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY, 104-06 (1961); Curtin, *National Emergency Dispute Legislation: Its Needs and Its Prospects in the Transportation Industries*, 55 GEO. L. J. 786 (1967); Wisehart, *Transportation Strike Control Legislation: A Congressional Challenge*, 66 MICH. L. REV. 1697 (1968); EMERGENCY PUBLIC INTEREST PROTECTION ACT OF 1971, MESSAGE FROM THE PRESIDENT, 117 CONG. REC. 1536 (Feb. 3, 1971).

219. *Id.* at 466-67. See also Comment, *Airline Labor Policy: The Stepchild of the Railway Labor Act*, 18 J. AIR L. & COMM. 461 (1951).

220. Levinson, *supra* note 218, at 690-91.

221. *Id.*

This integration will come as containerization grows, as the intermodal shipment of goods increases, possibly as the different modes come under common corporate ownership and operation. As these developments increase in scope, it will be increasingly desirable to have common legislative standards and unified administrative responsibility for dealing with labor relations in the industry as a whole.

tion labor law necessarily would involve choice, either implicitly or explicitly, between the interventionist and the abstentionist models, and between dynamic and static bargaining practices. Professor Levinson's policy recommendations have not generated any concerted movement toward development of a consolidated transportation labor law. Nevertheless, his observation that the transportation industry would become increasingly integrated is proving valid, and suggests that the consolidation issue once again should be discussed. It should not be assumed that the present legal framework for collective bargaining is appropriate for an industry whose structure has changed radically in fifty years. At this point in the evolution of a public policy for transportation, the parties whose affairs are conducted under both statutes—government, labor and management—should reflect on whether the time for a consolidated transportation labor statute has come. Such reflection should recognize the changes in the surface transportation industry, note the emergence of integrated transportation operations, such as package express and intermodal trailer/container movements, where employees performing part of the same service are covered by materially different labor law concepts and procedures, acknowledge realities of labor and product/service market competition, and reconsider the desirability of abstentionist or interventionist regulation.

To set the stage for this discussion, the regulatory history of common control of surface carriers, and trade union market behavior theory, will be discussed briefly. This approach helps to illustrate some of the collective bargaining issues an integrated transportation system will encounter under the present statutes.

#### A. *Regulation of Common Control of Surface Carriers*

Rail carriers were the dominant mode of surface transportation in the 1920s and 1930s.<sup>222</sup> The trucking industry was a mere infant, consisting mainly of small companies operating on narrow two-lane roads, with equipment of limited capacity.<sup>223</sup>

When Congress extended federal regulation to the motor carrier industry in 1935,<sup>224</sup> it was cognizant of railroad domination of surface transport. Therefore, railroads seeking to acquire control of a motor carrier carried a special burden—to demonstrate that the control would enable railroads to use motor carrier service to public advantage in rail operations, and that rail control would not restrain competition un-

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222. See text accompanying notes 150–53, *supra*.

223. As late as 1936 not all U.S. highways were paved. Dixie Greyhound Lines Extension, 1 M.C.C. 681, 685–86 (1937). State size and weight laws limited motor carrier loads to a fraction of those common today. Regulation of Sizes and Weights of Motor Vehicles, 30 M.C.C. 777, 785 (1941).

224. The Motor Carrier Act of 1935, 49 Stat. 555.

duly.<sup>225</sup> The Interstate Commerce Commission later developed a policy that encouraged the separate development of rail and motor carriers, fearing that, if unchecked, the large financial and marketing resources of the railroad industry would hamper the future of motor carrier service generally, to the detriment of the public interest.<sup>226</sup> In its interpretation of national transportation policy, the ICC extended ownership restrictions to rail requests for motor carrier operating authority. Such enterprises were required to show "special circumstances" as a prerequisite to obtaining unrestricted motor carrier authority.<sup>227</sup>

Few railroads or rail affiliates could meet this burden, and consequently, most motor carrier operating authority that was granted to the rails was limited to motor carrier service that was "auxiliary or supplemental" to railroad service.<sup>228</sup> For the most part, this administration of national transportation policy served to erect a practical barrier to large-scale competition between independent and railroad affiliated motor carriers.

The Congress recently revised the national transportation policy to promote competition and efficiency in all aspects of transportation, relying in part on the evolution of the dominant transport mode from rail to truck.<sup>229</sup> Further, in the Motor Carrier Act it relaxed the statutory standards for obtaining motor carrier operating authority, shifting the burden to opponents to prove that the new authority would be inconsistent with public convenience and necessity.<sup>230</sup>

As a result of the shift in industry structure and regulatory environment, the ICC relaxed restrictions on motor carrier operations by railroads,<sup>231</sup> and these operations are flourishing. Comprehensive "transportation systems" are evolving, with the transport company determining, in conjunction with the shipper, the most economical and ef-

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225. Former 49 U.S.C. § 5(2)(b), now recodified at 49 U.S.C. § 11344(c) (1980).

226. *See United States v. Rock Island Motor Transport Co.*, 340 U.S. 419, 431 n.9 (1951). *See also* *American Trucking Associations, Inc. v. United States*, 355 U.S. 141, 148-50 (1957), where the Supreme Court described ICC policy as "a logical method to ensure the maximum development of the two transportation agencies—rails and motors—as coordinate transportation services in accordance with . . . national transportation policy. . . ."

227. *Pennsylvania Truck Lines, Inc.—Control*, 1 M.C.C. 101, 112 (1936); *Kansas City S. Transport Co.—Application*, 10 M.C.C. 211 (1938); *Rock Island Motor Transit—Purchase*, 40 M.C.C. 457 (1946); *Rock Island Common Carrier Application*, 63 M.C.C. 91 (1954).

228. *Id.* *See also* R. LIEB, *FREIGHT TRANSPORTATION: A STUDY OF FEDERAL INTERMODAL OWNERSHIP POLICY* (1972).

229. *See, e.g.*, Findings (1), (2), (3), (5) of Section 2 of the Staggers Rail Act, 94 Stat. 1896; Section 3 of the Motor Carrier Act, 94 Stat. 793. *See also* 49 U.S.C. §§ 10101, 10101(a) (1980); 96 U.S. CODE CONG. & ADMIN. NEWS 2284 (1980).

230. 49 U.S.C. § 10922(b) (1982).

231. *American Trucking Associations v. ICC*, 722 F.2d 1243 (5th Cir.), *cert denied*, 53 U.S.L.W. 3324 (1984); *Tri State Motor Transit Co. v. ICC*, 739 F.2d 1373 (8th Cir. 1984).

ficient mode of transport for a particular commodity: all rail, all truck, or various combinations of each.<sup>232</sup>

The restrictive common control policy for surface carriers emanated from concern about railroad domination of water carriers,<sup>233</sup> and later was applied to common control of air carriers.<sup>234</sup> This regulation also appears to be relaxing<sup>235</sup> because of the same considerations of economic efficiency and integrated operation.

### B. Labor and Product/Service Market Competition

Deregulation has put strains on collective bargaining because it has freed product/service-market forces, which have put pressure on wage rates and employment levels. That collective bargaining cannot be insulated from market forces long has been recognized by scholars of industrial relations.<sup>236</sup> "Changes in prices, profits and employment in related markets do tend to affect wage rates."<sup>237</sup> At a symposium on transportation labor issues held in 1982, Professor Dunlop noted that a substantial part of trade union energies historically have been devoted to influencing product/service-market regulation.<sup>238</sup>

Professor Dunlop begins with the proposition that the price of labor

232. Roberts, *New Era in Transportation*, MODERN RAILROADS, OCT. 1984; Lieb, *Intermodal Ownership: The Perspective of Railroad Chief Executives*, 21 TRANSP. J. 70 (1982). See also *American Trucking Association v. ICC*, *Tri State Motor Transit Co. v. ICC*, *supra*; *CSX Corp.—Control—American Commercial Lines, Inc.*, ICC Fin. Dckt. 30300 (Dec. served Sept. 7, 1984); *Norfolk Southern Corporation—Control—North American Van Lines, Inc.*, ICC Fin. Dckt. 30,500; *Cosby v. ICC*, 741 F.2d 1077 (8th Cir. 1984); *Ohio Barge Line, Inc.*, 11 NMB No. 106 (1984). Eastern Airlines and Consolidated Freightways recently announced a three year joint venture for coordinated motor and air carrier service. *The Wall Street Journal*, February 15, 1985, at 5.

233. See also, *Lake Lines Application under Panama Canal Act*, 33 ICC 699 (1915). *Accord*, *Illinois Central R.R.—Control—John I. Hay, Co.*, 317 ICC 39 (1960). See *American Waterways Operators, Inc. v. United States*, 386 F. Supp. 799 (D.D.C. 1974), *aff'd* 421 U.S. 1006 (1975).

234. Section 408(b) of the Federal Aviation Act of 1958, formerly Section 408(b) of the Civil Aeronautics Act of 1938. See also *Continental Southern Airlines v. CAB*, 197 F.2d 397 (D.C. Cir. 1952); *Air Freight Forwarder Case*, 9 CAB 473, 509-12 (1948); *aff'd. sub nom*, *National Air Forwarding Corp. v. CAB*, 197 F.2d 384 (D.C. Cir. 1952); *American President Lines Petition*, 7 CAB 799 (1947); *American Export Lines Control*, 3 CAB 619 (1942), *aff'd. on reh'g*, 4 CAB 104 (1943).

235. The Airline Deregulation Act of 1978, 92 Stat. 1705, removed the special restriction on ownership of air carriers by surface carriers, substituting a general standard authorizing control unless control would result in a monopoly of air transportation in any region of the country.

236. See, e.g., J. DUNLOP, *WAGE DETERMINATION UNDER TRADE UNIONS*, 95-121 (1966) (hereinafter "DUNLOP"); Levinson, *Wage Determination under Collective Bargaining*, COLLECTIVE BARGAINING 86, 88-90 (A. Flanders, ed. 1969) (summarizing debate between Dunlop, advocating the influence of economic forces, and Ross, advocating the dominance of internal union political forces, as determinants of union wage policy).

237. DUNLOP, *supra* note 236, at iv.

238. Villanova Law School Center for Continuing Legal Education, *Deregulation and Industrial Relations*, Symposium on Transportation Labor Issues for the 1980's 1, 3 (May 17-18, 1982).

depends on the position of the buyers and sellers of labor in other markets in which they appear as buyers and sellers.<sup>239</sup> In other words, a relationship exists between "the demand function for a product and the demand function for the labor used to process this product."<sup>240</sup> "The more elastic the demand for the product and the larger the proportion of total cost that are wage costs, in general, the more difficult it will be to ignore the dependence of labor demand on product demand."<sup>241</sup> Transportation is labor intensive, and the demand for transportation services from any particular supplier is highly elastic. Accordingly, the Dunlop formulation explains why transportation labor should demonstrate a strong interest in product/service-market issues.

Two types of public policies are available to protect product demand and price, and hence to protect the price for labor and the demand for labor. The first type aims at supporting the product price.<sup>242</sup> Rate regulation is a clear example of such a policy. The second type aims at restricting competition in the product/service market in an effort to protect demand for the product or service in which labor is most interested.<sup>243</sup> Regulatory restrictions on new entrants are examples of this type of public policy in the transportation sector.

Much of the salient competition in the freight transport sector is now intermodal, as the new price and service regulatory framework recognizes. The Dunlop theory suggests trade unions representing employees on one mode should seek to discourage competitive threats from "foreign" modes.<sup>244</sup> Transportation industrial relations systems were organized and have matured along modal lines. As long as this remains the case, the potential for political initiative aimed at crippling the efficiency or flexibility of a competing mode or the growth of intermodalism, is high. Accordingly, those who wish to preserve deregulation or promote intermodalism should be concerned.

Evolution of an intermodal industrial relations system would reduce the incentives for such destructive political action.

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239. DUNLOP, *supra* note 236.

240. *Id.* at 96.

241. *Id.*

242. Dunlop offers examples from the glass bottle industry, in which trade union officials argued for price increases in the face of perceived inelasticity of demand. DUNLOP, *supra* note 236, at 97.

243. Dunlop notes that trade unions frequently seek to restrict the introduction of competitive products, by supporting tariffs or quotas on foreign goods.

244. The term "foreign" is used here to indicate a mode other than the one employing the constituents of the trade union. For example motor carriers would be a "foreign mode" to a railroad union; railroad piggyback would be a "foreign mode" to a Teamster. See LEVINSON *et al.*, *supra* note 126, at 58-70.



### C. Policy Issues

Increased motor carrier operations<sup>245</sup> by railroads will challenge collective bargaining under the RLA and NLRA in a number of ways. First, if railroads operate truck service directly, RLA jurisdictional questions will be raised. The Act excludes from the definition of carrier a company operating trucking service.<sup>246</sup> The present state of the law is that employees of a rail or air carrier performing truck service will be covered by the RLA if the trucking activity is integrally related to the rail or air transportation activity.<sup>247</sup> Efforts to challenge administrative and judicial administration of this rule may be presented by small rail carriers whose truck operations may surpass in size and importance their rail operations.

Representation disputes also may surface. Commonly, truck drivers employed by railroads are considered part of the craft or class of clerical and related employees,<sup>248</sup> represented chiefly by the Brotherhood of Railway and Airline Clerks. Railroads may encounter resistance to this scheme for representation from the International Brotherhood of Teamsters, which traditionally represents employees in the trucking industry, particularly if motor carrier operations include merger of trucking subsidiaries into the railroad.<sup>249</sup> Recognition of a new craft or class by the National Mediation Board would keep pace with transformation of industry structure.<sup>250</sup>

If railroads choose to avoid these jurisdictional and representation problems, and conduct motor carrier operations through a subsidiary company, the present state of the law is that the subsidiary would not be considered a carrier under the RLA because of the trucking service exclusion. The NMB has determined it cannot exercise jurisdiction over a

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245. Some thirteen railroads conducted some motor carrier operations through subsidiary companies prior to the Staggers and Motor Carrier Acts of 1980. ASSOCIATION OF AMERICAN RAILROADS, *THE ECONOMIC ABC'S OF THE RAILROAD INDUSTRY*, Table I-16 (1980). See also *Cosby v. ICC*, 741 F.2d 1077 (8th Cir. 1984).

246. Railway Labor Act § 1 First 45 U.S.C. § 151 First (1982).

247. *Federal Express Corp.*, 6 NMB 1032 (1978); *Chicago Truck Drivers v. NLRB*, 599 F.2d 816 (7th Cir. 1979). See also *Adams v. Federal Express Corp.*, 547 F.2d 319 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977); *Pan American World Airways, Inc. v. Carpenters*, 324 F.2d 217 (9th Cir. 1963). *cf.* *Anderson v. Bigelow*, 130 F.2d 460 (9th Cir. 1942) (Motor Carriage employees of a company engaged in motor and rail carriage were not covered by the RLA because there was no evidence that the employees performed services "incidental to rail traffic").

248. *Norfolk & Western Ry. Co.*, 1 NMB 68, 73 (1938); *National Airlines, Inc.*, 1 NMB 423, 430 (1947). See also *Railway Clerks v. Nashville, C. & St. Louis Ry. Co.*, 94 F.2d 97, 100 (6th Cir. 1937).

249. See note 245, *supra*.

250. See *Frontier Airlines*, 7 NMB No. 213 (1979) and text accompanying notes 193-211, *supra*.

motor carrier certificated under the Interstate Commerce Act.<sup>251</sup>

While this convenient distinction may be legally sustainable, it may not prove workable for a carrier's operations. If the carrier is economically rational, it may seek to integrate rail and truck operations to promote efficiency and attract business.<sup>252</sup> Sufficient integration of operations, with common management and control, could result in a joint employer situation, where the courts, and the NMB, have "pierced corporate veils" to hold separate companies responsible for each other's labor relations liabilities.<sup>253</sup> This judicial rulemaking to recognize collective bargaining responsibilities whenever an entity has a sufficient control over employment conditions has transcended barriers between federal and state law,<sup>254</sup> so the presence of two federal statutes should pose no serious hurdle. Major obstacles to healthy labor relations would result for both labor and management: definition of bargaining structure would be difficult if different groups of employees, and joint employers, have available different representation law and procedure; the same representation disputes described earlier could occur; and application of secondary pressure standards may become more complex.<sup>255</sup> Corporate distinctions at war with reality will not impede judicial enforcement of the labor laws, and the courts likely will seek to balance conflicting claims with uncertain results.

Bargaining structure problems would not be limited to management, however. In order to maintain their ability to eliminate competition over wages and working conditions, trade unions generally seek to expand bargaining authority to include products or services that can substitute for those whose markets already are covered by collective bargaining agreements.<sup>256</sup> Railroads with motor carrier authority may seek to substitute truck service for rail service, for reasons of cost alone or perhaps to minimize adverse effects of a labor dispute. A trade union's power will be diminished if it is precluded from expanding into the substitute market, especially if a rival labor organization represents employees who may gain from the use of the substitute mode of transportation. The reverse could occur also, of course, as railroad box car or

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251. Southern Region Motor Transport, Inc., 5 NMB 298 (1975); Holston Land Co., 5 NMB 307 (1975).

252. See generally D. PEGRUM, *TRANSPORTATION ECONOMICS AND PUBLIC POLICY* (1963); Lieb, *supra* note 232; Cosby, *supra* note 245.

253. Radio Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965); Oper. Eng. Local 627 v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975); *aff'd in part* 425 U.S. 800 (1979); National Transportation Service, Inc., 240 NLRB 565 (1979); Ground Services, Inc., 8 NMB No. 35 (1980). See also Cosby, *supra* note 245.

254. Wadsworth Academy, 262 NLRB No. 42 (1982).

255. See Perritt, *Am I My Brother's Keeper? Secondary Picketing under the Norris-LaGuardia Act*, 68 GEO. L. J. 1191 (1980).

256. THE STRUCTURE OF COLLECTIVE BARGAINING, *supra* at xxiii. See also M. ESTEY, *The Unions*, *supra* at 73-79.

"piggyback" service could be substituted for over the road trucking, with similar challenges to bargaining structure.

The tension between law and reality perhaps is best illustrated by comparing railroad intermodal service with airline package express. In both cases trucks are used to collect freight and move the freight to the rail yard or airport, where it is loaded onto a rail car or airplane. At the other end trucks again are used to deliver the freight to customers. In air package express, the truck service commonly is coordinated by the airline directly. Consequently, it is considered integrally related to air transportation and therefore employees in that service are covered by the RLA.<sup>257</sup> Railroad intermodal service has been conducted primarily through subsidiary companies because of regulatory restrictions, but the service area is integrally related to rail transport, and if that service is provided directly by the railroad, the employees are also covered by the RLA.<sup>258</sup> Nevertheless, the trucking service exclusion has been interpreted by the NMB to preclude the exercise of RLA jurisdiction over subsidiary companies that perform the motor carrier portion of intermodal service.<sup>259</sup> The relaxation of regulatory barriers is encouraging more modal integration, and therefore may challenge the contemporary utility of the RLA definition of carrier.

There is little doubt that legal rules could be developed by the courts and administrative agencies to deal with these issues. Courts have often remarked that their role is to enforce the labor laws in a manner that reflects industrial life.<sup>260</sup> It is logical to ask, however, whether it is wise to continue investing in separate labor laws for a transportation industry which is becoming increasingly integrated. Administrative duplication is obvious. Case-by-case rulemaking by administrative agencies and the courts is another problem that may impede labor relations stability,<sup>261</sup> especially as integration among transport modes increases. Preservation of separate statutes is likely to lead to even more litigation rather than to problem solving through collective bargaining. It is questionable whether greater reliance on legal, rather than private, adjustment is in the interest of either labor or management.

We acknowledge that the parties to the collective bargaining process have some fifty years experience under each Act, but transition to

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257. See note 247, *supra*.

258. See the definition of carrier in Section 1 First of the RLA, 45 U.S.C. § 151. See also note 253, *supra*.

259. See note 251, *supra*.

260. Compare *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 479-89 (1920) (Brandeis, J. dissenting) with *NLRB v. Longshoreman*, 447 U.S. 490, 507-10, (1980); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-83 (1960); and *Pennsylvania R.R. v. Day*, 360 U.S. 548, 552-53 (1959).

261. See Zimmerman, *Restoring Stability in the Implementation of the National Labor Relations Act*, 1 LAB. LAW. 1 (1985) (discusses how case-by-case decision making can disrupt stability).

collective bargaining under a new consolidated procedure would not be any more formidable than that faced by transport managers and shippers when antitrust immunity was removed from transportation rate-making, or when the CAB was phased-out and eliminated.<sup>262</sup> A consolidated statute might have varying effects on unions as institutions, but if that effect is negative on some, it will be positive on others. It is questionable whether resistance to consolidation will lessen threats to institutional viability; it may only direct the unions to alternative forums.

If multi-modal transport companies emerge and control larger portions of the transportation market,<sup>263</sup> policymakers also should reevaluate national emergency dispute standards. The RLA policy to postpone strikes facially may seem more important if a single company dominates multiple modes of transportation in a region or market. But this conclusion will not stand close scrutiny because postponement of strikes by an additional sixty days seems to do little to promote settlement. If fact-finding under Section 10 of the RLA and Section 207 of the NLRA is thought to be a necessary or desirable precursor to occasional congressional intervention in emergency disputes, it should be employed with that legislative objective in mind, i.e., sparingly, rather than as a routine terminal step in a process aimed at private settlement.

#### IV. Conclusion

Development of a consolidated transportation labor statute would present management and labor with difficult challenges, going beyond the usual political struggle over legislative provisions favorable to one side or the other. Both parties would be forced to decide implicitly, if not explicitly, whether they prefer to have their disputes resolved by legal institutions, or privately between themselves. Should they opt for an interventionist or abstentionist system? Additional regulation is not presently popular, but neither is uncertainty. It seems clear that opting for one statute or the other means more or less government intervention in collective bargaining. Whether a consolidated statute follows the original conceptual model of the NLRA, with an administrative agency to referee and to decide disputes over the details of representation and conduct at the bargaining table, or whether it follows the original conceptual model of the RLA, with legally enforceable rights and duties deliberately left vague in order to promote private adjustment, will test the

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262. KEELER, *supra* note 1; Miller, *Collective Ratemaking Reconsidered*, and Freidman, *What's Wrong with the Case against Collective Ratemaking?*, 11 *TRANSP. L. J.* 291-322 (1980); Caninato & Kogan, *An Assessment of the Impact from Partial and Full Repeal of Section 10706 (anti-trust immunity) Upon the Motor Carrier Industry and Its Users*, 47 *ICC PRAC. J.* 427 (1980). See also *Traffic World*, Aug. 17, 1981, at 29-30; Nov. 2, 1981, at 73-74; March 22, 1982, at 77, 94.

263. See note 232, *supra*, and *Chicago Truck Drivers, etc. v. NLRB*, *supra*, 599 F.2d at 816.

parties' and the country's commitment to collective bargaining. After more than fifty years of experience under different statutes, policy-makers now may be able to make a more informed choice that is compatible with the public consensus and interest.

The choice between interventionist or abstentionist regulation would not be a new one for the body politic, labor and management included. The choice is largely one of regulation by law or markets, and both have been preeminent in adjusting social relations in United States history.<sup>264</sup> There are advantages to each, but we believe the evidence gives cause for concern that our present labor regulatory system may be too rigid to serve effectively both the demands of the new transport competition and full collective bargaining.

When comparing regulation by law or markets, "[t]wo pairs of features stand out: the law as an area of commands, the market as an area of agreements; and the law as a monopoly of service and regulation, the market as a regime of competition."<sup>265</sup> The discussion in Parts I and II shows how originally the RLA and NLRA represented fundamentally different approaches to regulation of collective bargaining, much like the choice between markets and law. But over time each has converged through judicial and administrative interpretation, and RLA regulation has crept closer to the NLRA. The abstentionist regulatory choice has been increasingly converted to interventionist legal regulation. That the results fifty years later are unsatisfying to some should not be surprising; the law has always been somewhat inflexible in its freezing of values which exist at the time of its enactment.<sup>266</sup> This is the law's inherent strength and weakness.

The labor laws presently represent a hybrid regulatory choice for transportation. The laws command bargaining, sometimes interminably, but leave the parties somewhat free to agree on terms. Much discretion is removed from the parties, however, as the law increasingly monopolizes regulation of certain conduct, like bargaining tactics, economic weapons, negotiating units, and outside the RLA and NLRA context, monopolizes minimum regulation of health, safety, employment opportunity, and minimum pay and hour standards.<sup>267</sup> While noble in purpose, such developments often frustrate adjustment of working conditions to the satisfaction of the key actors, labor and manage-

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264. J. HURST, *LAW AND MARKETS IN UNITED STATES HISTORY* (1982) [hereinafter HURST].

265. *Id.* at 93-94.

266. *Id.* at 94.

267. Dean Hurst suggests the labor movement originally sought the support of the law only to promote and institutionalize bargaining, but not detailed regulation. "Some voices spoke for revolution out of the turbulence of management-labor relations from the 1880's into the 1930's. But . . . organized labor strove mainly for law that would foster its capacity for more effective trading in the market." *Id.* at 140.

ment,<sup>268</sup> especially when governments or transport modal regulations change.

The recent changes in federal regulation of the air, rail, and motor carrier industries demonstrate an increasing reliance on markets as the preferred regulator of transport price and service. Similarly, it may be time to embrace a regulation of collective bargaining that is less dependent on law and more dependent on the parties voluntarily to order their affairs. "In contrast to law, market processes commonly operate by agreement to reach adjustments of relations on terms satisfying to those involved. Monopoly is the opposite of what the community wants when it values the market as an institution for promoting efficient allocation of resources."<sup>269</sup> Transport labor relations would move closer to the basic economic system under such an approach, and institutional impediments to responsiveness may be reduced.

In sum, we recommend a neoabstentionist approach (for lack of a better term) to transport labor regulation: firm minimum guarantees to promote collective bargaining and prevent abuse, but redefinition of other standards to enhance adjustment of relations by agreement. For example, the principle of exclusive representation by a bargaining agent is important enough to embrace solid governmental intervention in the selection and certification process. Exclusive representation promotes both employee choice and a degree of institutional security that may be necessary for healthy collective bargaining. The British experience with multi-unionism, and its consequences for economic disruption, seems unworthy of repetition.

Once the parties to the bargaining process have been started on their way, there presently is little need for government intervention, however. The transportation industry was deregulated in part because Congress recognized the industry is decentralized, and no one mode or carrier dominates the field. The RLA's "interminable" interest dispute resolution process, with governmental determination of self-help timing, is anachronistic.

A neoabstentionist approach to strike timing should not include sub-

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268. Labor and management generally reject government establishment of working conditions because it impairs the parties' freedom to reach their own settlement and express their own values.

. . . [i]t all goes back to their belief that the essence of bargaining of any kind is the freedom of either party to haggle over each term, to compromise and balance out offers and counteroffers, and finally to reach a decision to accept or reject on the basis of their own values with all of the circumstances in mind. . . . For the essence of collective bargaining remains the parties' privilege to fix their own terms in every respect—a process that no outsider can possibly be trusted by them to understand or accomplish. . . . When [unions and employers] are compelled to abrogate their bargaining function—the weighing and balancing of values—then free enterprise has come to an end.

C. GREGORY & H. KATZ, *LABOR AND THE LAW*, 3d ed., 586 (1979).

269. HURST at 94, 96.

stitution of NLRA impasse practice for NMB termination of mediation, however. Today, decisionmakers under both statutes make virtually the same inquiries,<sup>270</sup> but impasse under the NLRA is a legal decision, made by the NLRB and the courts applying facts to law, and therefore by necessity requires much governmental supervision of bargaining conduct. In contrast, the NMB's decision is made largely on industrial relations rather than legal criteria,<sup>271</sup> but suffers from the fatal flaw of substituting the government's industrial relations judgment for that of the parties'. The institution of collective bargaining relies on the balance of economic power for decisionmaking, and the preferable approach would be to enforce bargaining duties only through deadlines set by the parties themselves, i.e., negotiated termination dates.

The NMB's mediation efforts would be aided by a more abstentionist regulation. Mediation is an element of collective bargaining and works best when deadlines are real and close enough to focus the parties' balancing of interests.<sup>272</sup> Interminable processes, and standby governmental intervention, impede real bargaining because

the most important inducement to agree is removed. The penalties for failing to agree—stoppage of production and employment—are waived. Even more devastating consequences result. Each party is reluctant to make any concessions around the bargaining table. That might "prejudice" its case before the [governmental board]. In addition, the number of issues is kept large and formidable. Demands that customarily "work out" in negotiations are carefully preserved to submission to the board. Why not? There is everything to gain and nothing to lose by trying to get one's unusual demands approved without cost.<sup>273</sup>

Abstentionist regulation could make strikes more likely, although available evidence suggests caution before reaching that conclusion; there has been no substantial increase in trucking strikes since the Motor Carrier Act of 1980 or on the airlines since the Airline Deregulation Act of 1978.<sup>274</sup> In part this may be because of the competitive transportation marketplace. New entrants or modal substitutes would prevent any real crisis if a single company were disrupted, and the same may be true for railroads and airlines. These market realities would test the parties' ability to balance together their interests and values in a creative way

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270. Compare C. Rehmus, *The National Mediation Board* at 50, *supra*, at 46–61, with Taft Broadcasting, 163 NLRB at 475.

271. REHMUS, *id.*

272. W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (1971).

273 G. Taylor, *Is Compulsory Arbitration Inevitable?* Proceedings of the First Annual Meeting, Industrial Relations Research Association, 64 (1948), cited in G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS*, 750–52 (9th ed. 1981). See also the Report of Emergency Board 200 and Public Law No. 97–262, both of which deal with efforts by the Brotherhood of Locomotive Engineers to resist bargaining table concessions and procure additional benefits via governmental intervention.

274. CAPPELLI & HARRIS, *AIRLINE INDUSTRIAL RELATIONS IN TRANSITION*, *infra* note 320.

outside government control.<sup>275</sup> Economic power should not be exercised in an unfettered way, of course, especially since law and markets share the common characteristic that each provides leverage by which individuals or groups can exert practical and legal compulsion on the wills of others.<sup>276</sup> If the parties voluntarily order their affairs in a centralized way through multi-employer bargaining, and place more of the economy in jeopardy, the case for governmental intervention is enhanced. But this would be a voluntary undertaking by the parties to the collective bargaining process, and therefore is consistent with an abstentionist regulation. Governmental intervention would be ad hoc and sharply focused in such a case, and therefore more likely to be responsive to the facts.<sup>277</sup>

If the correct course for future transportation labor policy is toward less intervention, the Norris-LaGuardia Act represents an appropriate conceptual anchor. We observed earlier that abstentionism was the theme both in Britain and the United States until enactment of the NLRA in 1935.<sup>278</sup> The RLA, while more abstentionist than the NLRA, was amended in 1934 to provide for a greater degree of interventionism with respect to grievance resolution and employee representation.<sup>279</sup> In a sense then, the Norris-LaGuardia Act marked the high-water mark of

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275. Such freedom is not without risk. See, e.g., the basic steel Experimental Negotiating Agreement of the 1970s, and auto industry settlements in the same decade. Both represented miscalculation by the parties of the impact settlements would have on the ability of the auto and steel industries to compete in a world market (although of course labor costs represent only one important aspect of the complex problems faced by those industries). Compare A. ALTCHULER, *et al.*, THE FUTURE OF THE AUTOMOBILE, 199–222 (1984), with Stieber, *Steel*, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE, *supra*, and Kassalow, *Crisis in the World Steel Industry: Union-Management Responses in Four Countries*, a paper presented to the December 1984 Meeting of the Industrial Relations Research Association. See also the 1979 strike against the Rock Island Railroad, where some believe rail unions misjudged the bankrupt company's finances, and the prospect for government intervention, and caused the first major railroad liquidation in decades. Rowe, *Perceptions of Failure and Collective Bargaining in the Railroad Industry*, 51 ICC PRAC. J. 245 (1984) (hereafter "Rowe").

276. HURST, *supra* at 96, 104–05.

277. One commentator argues persuasively that only sharply focused governmental policy, and the fear of company failure, provide for adaptive rail bargaining. Rowe, *supra*. See also Perritt, *Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis*, 28 VILL. L. REV. 271 (1983).

278. See Part I *supra*.

279. See H.R. REP. NO. 1944, 73d Cong., 2d Sess. (1934) (recommending passage of H.R. 9861, amending the Railway Labor Act to prohibit "company unions" and to set up compulsory machinery for arbitration of grievance disputes). H.R. 9861 was passed by the House on June 18, 1934. 78 CONG. REC. 11720. The Senate substituted the text of s.3266 for the text of the House bill. 78 CONG. REC. 12402. See S. REP. NO. 1065, 73d Cong., 2d Sess. (1934) (recommending passage of s.3266). The House, rather than risk congressional adjournment before final action on amendments to the Act, accepted the Senate amendments, 78 CONG. REC. 12549–12555 (June 18, 1934), and the measure was signed into law. 48 Stat. 926 (1934).



American abstentionism.<sup>280</sup> Accordingly, one needs to consider the future role of labor injunctions under a neoabstentionist approach.

Four basic types of injunctions are available under the Norris-LaGuardia Act: injunctions requested by the NLRB to enforce specific statutory duties imposed by the NLRA;<sup>281</sup> injunctions to enforce collectively bargained no-strike clauses, under the *Boys Markets* doctrine;<sup>282</sup> injunctions against strikes over minor disputes covered by the Railway Labor Act, under the *Chicago River* doctrine;<sup>283</sup> and injunction against self-help before exhaustion of the major dispute procedures of the Railway Labor Act.<sup>284</sup> A strong move toward an abstentionist policy would challenge the availability of three of these four categories of injunctions.

Major dispute injunctions under the RLA would be curtailed as government intervention into the settlement of interest disputes is reduced.<sup>285</sup> Similarly, injunctions requested by the NLRB to enforce specific statutory duties would be curtailed as those statutory duties are reduced. That leaves the two categories of injunctions that relate to grievance dispute adjustment under the two statutes. We believe *Boys Markets* injunctions are not basically interventionist. They represent government involvement, but only to enforce agreements voluntarily made by the parties in collective bargaining. Section 301 of the LMRA could be adapted to protect railroad and airline labor contract obligations and avoid disruption from a change in RLA major dispute enforcement machinery. There is thus no conceptual inconsistency between an abstentionist labor policy and the continued availability of this type of injunction.

There is an inconsistency between abstentionism and *Chicago River* injunctions, however. As rail labor unsuccessfully argued to the *Chi-*

280. See C. SUMMERS, H. WELLINGTON, AND A. HYDE, *LABOR LAW CASES AND MATERIALS* 19-20 (1982) (comparing effect of Norris-LaGuardia Act and "Far more fundamental change in the role of law, represented by the National Labor Relations Act"); C. MORRIS, ed. *THE DEVELOPING LABOR LAW*, *supra* at 22-26; (characterizing the Norris-LaGuardia Act as "laissez faire" and explaining the evolution of more affirmative approach represented by National Labor Relations Act).

281. 29 U.S.C. § 160 (j) (1). Railway Labor Act parties also can obtain injunctions to enforce similar RLA duties. *Summit Airlines v. Teamsters*, 628 F.2d 787 (2d Cir. 1980). *Ashley, Drew & Northern RR Co. v. Transportation Union*, 625 F.2d 1357 (8th Cir. 1980). *Perritt, Ploughshares into Swords from Buffalo Forge*, 12 *TRANS. L.J.* 219 (1982).

282. *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970) (approving injunctions to enforce no strike clause when dispute is subject to arbitration); See also *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976) (applying *Boys Market* to preclude injunctions against strikes over non-arbitrable disputes).

283. *Railroad Trainmen v. Chicago River & Ind. R. Co.*, 353 U.S. 30 (1957) (approving injunctions against strikes over disputes that are subject to arbitration under the Railway Labor Act).

284. See *Chicago & N.W. Ry. v. Transp. Union*, 402 U.S. 570, 584 (1971) (strikes before exhaustion of major disputes procedures are enjoined).

285. See notes 150 to 161 *supra* and accompanying text.

cago River court,<sup>286</sup> awards of grievance adjustment boards under the RLA conceivably can be enforced either by economic pressure or by litigation. The Supreme Court rejected the economic-pressure option as inconsistent with RLA policy.<sup>287</sup> If policy is to shift toward abstentionism, however, economic pressure to enforce an arbitration award ought to be an option unless the parties have agreed to the contrary. If management has not bargained successfully for a no-strike or comprehensive arbitration clause, and a labor organization really wants to strike over an individual grievance, there presently is no sound reason that the law should say, "No."<sup>288</sup>

A neoabstentionist approach also is appropriate for bargaining structure. With initial units as points of departure, the parties can organize themselves freely to maximize their perceived economic power. Governmental intervention would be limited to preservation of employee choice as tested by a community of interest. Determination of that community of interest should be dynamic, not static, however. It should keep pace with changing technology, institutions, and the economy, and forego policies that promote relationships according to an historical least common denominator. Employee concerns can be addressed in an abstentionist bargaining environment, as they seek to influence how work is organized by their economic pressure.

This recommendation is not without precedent under the RLA. In 1974 the NMB followed labor and management's redefinition of bargaining structure as changing technology caused telegrapher work virtually to disappear. A new consolidated bargaining unit was recognized by the NMB after the parties had established it in a voluntary way by agreement.<sup>289</sup> The NMB could foster this abstentionist regulation by expanding its publication of policy guidelines<sup>290</sup> to include technological development and evolving business organizations, and thereby encouraging the parties' behavior. This would follow NMB mediation and

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286. 353 U.S. at 34.

287. 353 U.S. at 34-39.

288. The Teamsters union and the organized trucking industry currently operate under such an open-ended grievance dispute scheme, if labor and management deadlock. Both parties have been satisfied with the experience. Levinson, *Trucking*, COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE, *supra* note 3, at 128-29.

289. Central Railroad Company of New Jersey, *supra*, 5 NMB at 333-34. In another voluntarist bargaining structure development, the Transport Workers Union and Brotherhood of Railroad Carmen agreed with Consolidated Rail Corporation to joint representation of the carmen craft or class, freezing employee affiliation according to pre-consolidation groupings. This is a departure from the NMB's insistence on a single representative for a system-wide craft or class, but is an accommodation the parties developed and with which they are comfortable.

290. Republic Airlines, Inc., 7 NMB No. 11 (1979) (the NMB published guidelines for determining bargaining representatives on merged carriers).

strike-timing practice, where the Board coordinates treatment of closely related employee groups.<sup>291</sup>

Any policy choice between interventionism and abstentionism should take account of organized labor's preference. The evidence suggests that labor has to date preferred interventionism. Trade unions have pressed for "labor law reform" in a way that would increase penalties and tighten regulation of bargaining duties under the NLRA,<sup>292</sup> and campaigned for minimum federal regulation of working conditions, especially health, safety, and retirement security.

We urge an open mind on whether interventionism really would serve labor's long-run interests as well as would a more abstentionist approach, however. First, intervention brings with it political preferences of the party in power. Louis Brandeis, before he took the bench, urged that regulation by markets and competition be favored over law for just this reason.

Do not believe that you can find a universal remedy for evil conditions or immoral practices in effecting a fundamental change in society . . . and do not pin too much faith in legislation. Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression. Seek for betterment within the broad lines of existing institutions. Do so by attacking evil *in situ*; and proceed from the individual to the general.<sup>293</sup>

Second, increasing the scope and strength of statutory protections for individual employees gives the employees less reason to opt for union representation to protect their interests through collective bargaining.<sup>294</sup> Third, a panoply of law invites much litigation, as the comparative NLRA-RLA statistics indicate, and litigation has its practical limits. "Lawsuits are expensive and require more energy, courage and persistence than many complainants can muster. Too, a given suit focuses on particular grievances, with no firm assurance that the outcome will control what [others] do in other circumstances."<sup>295</sup>

Recent trade union frustration with NLRB personnel and adjudicative decisions has yielded public statements supporting more reliance on economic pressure than on litigation. The AFL-CIO recently stated that the NLRA was "impotent"; the NLRB was "inert" and had become "a tool of the adversary."<sup>296</sup> The Teamsters, the chief union representing employees in trucking and prominent in the airline industry as well, is quoted as "increasingly reluctant" to use legal institutions to resolve problems. Rather, it is turning to "direct action—strikes and corporate

291. See note 148 *supra*.

292. See, e.g., C. GREGORY & H. KATZ, *LABOR AND THE LAW*, 643-47 (1979).

293. A. LIEF, *ed.*, *THE BRANDEIS GUIDE TO THE MODERN WORLD* 51 (1941) cited in HURST, *supra* at 118.

294. See H. PERRITT, *EMPLOYEE DISMISSAL LAW & PRACTICE* 335 (1984) (reviewing trade union opposition to legislative protection of individual employees).

295. HURST, *supra* at 118.

296. 1984 DAILY LABOR REPORT No. 30 at C-1 (Feb. 13, 1985).

and comprehensive strategies—to apply pressure to employers.<sup>297</sup> This change of attitude suggests for some a return to labor's roots,<sup>298</sup> but a "new approach to new problems for others."<sup>299</sup>

More important than the rhetoric is that labor's gains must be won and protected ultimately by the threat, or actual use, of economic pressure. Regardless of the statutory machinery (absent compulsory interest arbitration) the time will come when economic action is legal to enforce bargaining demands; "in collective bargaining, economic power provides the final arbitrament."<sup>300</sup> If labor is unable to muster sufficient strength to win an economic strike, it is questionable whether strong government intervention makes any real difference.

One union objection to neoabstentionism can be anticipated; interventionism is necessary if organizing campaigns are to be successful. We doubt that this premise is accurate. First, under the British abstentionist environment, it has been said that "as a power countervailing management, the trade unions are much more effective than the law has ever been or can be."<sup>301</sup> Second, there is some empirical evidence from the public sector that pledges of neutrality from the chief executive officer of a public employer are more effective organizing tools than invocation of statutory rights enshrined in unfair labor practice statutes.<sup>302</sup> In the private sector, of course, it is difficult to identify the analogue of a government official from whom a meaningful neutrality pledge can be sought. But there are forms of economic pressure that can be exerted in an abstentionist legal environment that may facilitate organization as much—or more—than a complex legal structure.

A special study commissioned by the AFL-CIO recently recommended increased pursuit of neutrality pledges, at the bargaining table

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297. *Id.*

298. HURST, *supra* at 140.

299. L. Apar and C. Trost, *Realizing Their Power Has Eroded, Unions Try Hard to Change*, WALL S. J., February 21, 1985, p. 1. See also AFL-CIO Committee Report, *supra*; BUREAU OF NATIONAL AFFAIRS, UNIONS TODAY: NEW TACTICS TO TACKLE TOUGH TIMES, (1985) (thirty case studies of union responses to the decline in union influence and power); and *Symposium: The Role of Unions in the 1980's*, 52 *FORD. L. REV.* 1061-1157 (1984).

300. Taylor, *supra* note 273.

301. O. KAHN-FREUND, *supra* at 12. We acknowledge that the 1984-85 miners strike in Britain challenges this conclusion, but one reason for the strike's limited effect was the legal restraints on secondary pressure, discussed in Part I.

302. An unpublished, informal survey of public sector organizing campaigns reveals that a union's chance for success is promoted more by public employer neutrality, achieved largely through the political process, than any statutory guarantee or adjudicative rights. See also Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 *HARV. L. REV.* 351 (1984) (arguing that greater freedom to use secondary pressure would enhance union organizing efforts).

and in the political and corporate arenas, to aid organizing.<sup>303</sup> Such "top down" organizing is common in most other industrial countries.<sup>304</sup> There is also secondary pressure. Before enactment of the 1959 amendments to the NLRA,<sup>305</sup> it was not uncommon for labor organizations, especially the Teamsters,<sup>306</sup> to negotiate "hot cargo agreements," which restrict commerce with targets of organizing campaigns. Such agreements now are prohibited by Section 8(e) of the NLRA.<sup>307</sup>

An aggressive abstentionist legal reform should reexamine such prohibitions, and perhaps reopen a variety of economic weapons that could be used to organize workers.<sup>308</sup>

Policymakers can choose between comprehensive or incremental action to implement change. An excellent case can be made for the former, especially to resolve a direction for the future—abstentionist or interventionist.<sup>309</sup> However desirable this might be, history suggests significant legislative reform is unlikely without major economic crises,

303. Report of the AFL-CIO Committee on the Evolution of Work on the Changing Situation of Workers and Their Unions, 1985 DAILY LABOR REPORT No. 37, D-2, D-4, D-5 (Feb. 25, 1985). The report lacks any specific recommendation on whether, or how, the legal structure for collective bargaining should be changed.

304. G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS*, 9th ed., *supra* at 121-22.

305. 73 Stat. 525 (1959).

306. R. DERESHINSKY, A. BERKOWITZ, & P. MISCIMARRA, *THE NLRB AND SECONDARY BOYCOTTS*, 239-244 (1981) (describing developments leading to enactment of Section 8(e) prohibition of hot cargo agreements). See also Levinson, *Trucking*, *supra* note 3, at 136.

307. 29 U.S.C. § 158(e) (1982).

308. See Weiler, *supra*. It is also possible, of course, that certain bargained restrictions on dealing with organizing targets would violate the antitrust laws. See *Kaiser Steel v. Mullins*, 455 U.S. 72 (1982) (court confronted with illegality defense in action to enforce collective bargaining agreement must decide antitrust and Section 8(e) question); *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975) (suggestion that Section 8(e) question must be decided in order to decide antitrust exemption question; finding collective bargaining restriction on subcontracting violative of antitrust laws); *Consolidated Express, Inc. v. New York Shipping Assoc.*, 602 F.2d 494, 517-18 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980), *on remand*, 641 F.2d 90 (3d Cir. 1981) (hot-cargo agreement may be a per se violation of antitrust laws). Questions remain, however, about how tightly linked is Section 8(e) with the labor exemption to the antitrust laws. Accordingly, a liberalization of the types of economic pressure permitted in aid of organization well may broaden the labor exemption to the antitrust laws.

309. The recent decision in *Cosby v. ICC*, *supra*, demonstrates the risks of too much reliance on today's legal structure. Government intervention has characterized protection of railroad employees from business changes since New Deal legislation freezing jobs. H.R. REP. NO. 96-1035 on H.R. 7235, *The Rail Act of 1980*, House Committee on Inter. & For. Commerce, 96th Cong., 1st Sess. May 16, 1980; Rowe, *supra* note 275. Rail labor foregoes collective bargaining on the effects of many business changes because federal law prescribes employee benefits (*e.g.*, 49 U.S.C. §§ 10903, 11347, 10505(g); 11 U.S.C. §§ 1167, 1170(e) (1982); *RLEA v. ICC*, 735 F.2d 691 (2d Cir. 1984)), and there is some authority holding that such law may preempt Railway Labor Act bargaining procedures. *Missouri Pacific Railroad v. Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984); *Norfolk & Western Ry. Co.—N.Y., Chi. & St. L. R.R. Co.—Merger*, 347 ICC 506, 511-12 (1974). *Cosby* suggests courts may expand this interventionist tradition to railroad controlled trucking companies, notwithstanding contrary legislative history, further frustrating accommodation of intermodal growth by collective bargaining.

perhaps from work stoppages. If events should engage the throttle of legislative change, policymakers would do well to consider the RLA as a framework for adaptive collective bargaining. While certainly imperfect, eschewing litigation and rulemaking may force the parties to attempt problem solving at the bargaining table instead of the hearing room. A new statute with less administrative machinery would counter a 100 year trend in American law, but on the other hand, that's what deregulation is all about. Decisionmaking driven by market forces is good not only for the product and service markets; it also may be good for labor markets and for the trade union movement.

Much is still possible even if incremental change is all that presently can be expected. Frequent political changes at the NLRB often cause its policies to fluctuate dramatically in abstentionist or interventionist directions. Recently, the NLRB changed a number of its policies to reduce intervention by the Board, and to increase reliance on voluntarily reached contractual arrangements between the parties. For example, in *Olin Corp.*,<sup>310</sup> the NLRB broadened the circumstances under which it would defer to arbitration awards rather than deciding *de novo* claims that involve both unfair labor practice and breach-of-contract allegations.<sup>311</sup>

In *Illinois Coil Spring*,<sup>312</sup> the Board, reversing an earlier decision, held that transferring work without union consent did not violate the employer's statutory duty to bargain, when the collective bargaining agreement did not prohibit such a transfer.<sup>313</sup> Similarly, in *Otis Elevator*,<sup>314</sup> the Board held that an employer need not bargain over certain transfers of work made for business reasons if the labor agreement did not address the issue.<sup>315</sup>

Change under the RLA also can be achieved incrementally. The NMB, with its virtual immunity from judicial review, can develop strike timing and bargaining unit policies compatible with today's facts, not yesterday's history. The courts remain available to ensure the Board does not depart from the RLA's basic boundaries, but those shores are

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310. 268 NLRB No. 86 (1984).

311. *Id.*

312. 268 NLRB No. 87 (1984).

313. *Id.*

314. 269 NLRB No. 162 (1984).

315. *Id.* We acknowledge that organized labor has legitimate reasons to be upset with these decisions; see Zimmerman, *Restoring Stability in the Implementation of the National Labor Relations Act*, 1 LAB. LAW. 1 (1985). Our point is not to endorse the decisions; rather, the point is to show the wisdom of Brandeis's advice to prefer market over legislative problem solving, and to recommend that the parties direct dispute resolution behavior to the bargaining table rather than the courts.

distant.<sup>316</sup> We are confident that the modest proposals advanced in this article can be sustained. The most important part of incrementalism is that it be guided by coherent, and intelligible policy goals. The daily "firefighting" necessary in a bureaucracy can divert even one with a clear sense of strategy.<sup>317</sup>

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Industrial relations should be viewed as a system which is constantly moving toward a new equilibrium.<sup>318</sup> Labor market policies and product or service market policies are integral parts of the system that interact; change one part and there will be consequences for the other parts. A stable equilibrium eventually may result, although when or how that occurs, and at what cost, requires study and preparation. Otherwise, the system may prove to be inherently unstable, stirring up further efforts at change, including reversal to the pre-existing status quo by those who had enjoyed more secure positions.<sup>319</sup>

Much of this construct captures today's transportation industry. Very little, if any attention was paid to the effect deregulation would have on collective bargaining.<sup>320</sup> Today all transport companies struggle with new competitive forces. More importantly, those companies with mature bargaining systems<sup>321</sup> encounter additional stress from an industrial relations system that grew up in a tightly controlled environment but which now is expected to be responsive to market conditions.

316. One court concluded that the NMB could be reversed only for "egregious error." *United States v. Feaster*, 410 F.2d 1354, 1368 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969). We are aware of only two reported cases where NMB action was not upheld. *Russell v. Nat'l Med. Board*, *supra* (court ordered an election procedure that might result in decertification); *Intn'l In-Flight Catering v. Nat'l Med. Board*, 555 F.2d 712 (9th Cir. 1972) (NMB authorization cards did not comply with the RLA). The Board's discretion in mediation and control of strike timing may be even broader than in representation matters. Judicial review is authorized only if the NMB is "completely arbitrary" for a patently unreasonable time. *Machinists v. Nat'l Med. Board*, *supra*, 425 F.2d at 537.

317. G. SHULTZ & K. DAM, *ECONOMIC POLICY BEYOND THE HEADLINES*, 18 (1977).

318. J. DUNLOP, *INDUSTRIAL RELATIONS SYSTEMS* (1958).

319. *Id.* See also Dunlop, *Deregulation and Industrial Relations*, *TRANSPORTATION LABOR ISSUES FOR THE 80's*, *supra* note 238.

320. *Deregulation Effects on Transportation Industries*, 118 LAB. REL. REP. (BNA) 84 (1985) (paper presented by J. Dunlop to the Transportation Research Board). Also, *compare Deregulation Impact on Labor Management Relations*, 102 LAB. REL. REP. (BNA) 15-17 (1979), with Cappelli & Harris, *Airline Industrial Relations in Transition*, and Arouca, *Railroad Collective Bargaining: Anatomy or Pathology?*, papers delivered before the Industrial Relations Research Association, December 30, 1984, reported at 1985 DAILY LAB. REP. No. 9 at D-3 to D-11 (Jan. 14, 1985).

321. Mature bargaining has been described to be present when two developments occur. "First, management accepts the union is in the workplace to stay. Second, union members and leaders accept that the union is not all powerful, and that running the business is still a management function." G. BLOOM & H. NORTHROP, *ECONOMICS OF LABOR RELATIONS*, *supra* at 123. This state described between 80 and 90 percent of rail and trucking prior to deregulation, with airlines running about 55 percent organized. R. LIEB, *LABOR IN THE TRANSPORTATION INDUSTRY* (1972).

Interventionist regulation is partially to blame here; over time the parties had learned to rely on and manipulate its legal rules safe in their legally protected positions.<sup>322</sup>

The presently evolving equilibrium is much different. Regulation of prices and services by markets and competition demand flexibility, something the old industrial relations system did not promote. So while collective bargaining in the union sector of the transportation industry struggles to accommodate product/service-market realities, the non-union sector, with no restrictive labor market tradition, flourishes.<sup>323</sup> This threatens the growth of collective bargaining.

It just cannot be gainsaid that product/service markets and labor markets interact, and that deregulation of the former does not equal a comprehensive transportation policy.<sup>324</sup> Indeed, to ignore the impact of product/service market deregulation on collective bargaining may be economic and political folly. Unresolved stress on labor market institutions will manifest itself in political pressure to reverse the deregulation tide.<sup>325</sup> Whether a government should invest in a transportation labor policy could become a moot issue; without such investment deregulation may not survive. We suggest that the redefinition of labor law and policy discussed here will help promote deregulation, and real collective bargaining, by better assisting the parties to reach on their own a new, vibrant and contemporary industrial relations system for the transportation industry.

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322. Dunlop, *supra* note 320.

323. See note 3, *supra*, and Dunlop, *supra* note 320.

324. Dunlop, *supra* note 319.

325. See Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329 (1984). The Teamsters opposed the Motor Carrier Act of 1980, and have prevailed upon Congress and the Reagan Administration to slow the pace of change. See, e.g., 1984 DAILY LAB. REP. No. 122, p. A12; 1981 LAB. REL. YEARBOOK 244 (BNA). That union also has opposed administrative deregulation by the ICC. See *American Trucking Associations v. ICC*, *Tri State Motor Transit Co. v. ICC*, *supra*. Various parties are seeking to reverse railroad deregulation under the Staggers Act (see ICC Ex Parte No. 456, Staggers Rail Act of 1980—Conference of Interested Parties) and have enlisted rail labor and AFL-CIO support, citing in part alleged adverse affects of new competition on employees. Discussions with rail union presidents, January and March 1985.





# Notes on Developments in Labor and Employment Law\*

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\*The notes in this portion of *The Labor Lawyer* are based upon reports prepared by the various Committees of the Section of Labor and Employment Law. The Committees are responsible for the accuracy and thoroughness of the reports. In general the reports cover developments through March 1984.

